80-850

NO.

Supreme Court, U.S.
FILED
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MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

ELIE JONES, WARDEN,
STONE MOUNTAIN CORRECTIONAL
INSTITUTION,

*Appellant,*

versus

BOBBY H. HELMS,

*Appellee.*

**On Appeal from the United States Court of Appeals for the Fifth Circuit**

## JURISDICTIONAL STATEMENT

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## QUESTION PRESENTED

Whether or not Ga. Code Ann. § 74-9902 is violative of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, when the classifications established by said Code Section impose a misdemeanor penalty on those parents who willfully and voluntarily abandon their children and remain within the State of Georgia; while increasing the punishment to felony status for those parents who willfully and voluntarily abandon their children and leave the State, or after leaving the State.

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NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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ELIE JONES, WARDEN,
STONE MOUNTAIN CORRECTIONAL
INSTITUTION,

Appellant,

versus

BOBBY H. HELMS,

Appellee.

---

On Appeal from the United States
Court of Appeals for the Fifth Circuit

---

# JURISDICTIONAL STATEMENT

---

Appellant, Elie Jones, appeals from the final judgment of the Fifth Circuit Court of Appeals, which holds that the felony provisions

of Ga. Code Ann. § 74-9902(a), as applied in this case, are unconstitutional as being violative of Appellee's right to interstate travel, and right to equal protection as guaranteed by the Fourteenth Amendment of the Constitution of the United States.

## OPINIONS BELOW

The published opinion of the Fifth Circuit Court of Appeals, which appears in Appendix C, infra, is reported as Helms v. Jones, 621 F.2d 211 (5th Cir. 1980). The order denying habeas corpus relief by the United States District Court for the Middle District of Georgia, Columbus Division, the order denying a certificate of probable cause to appeal by the Georgia Supreme Court, and the findings of fact and conclusions of law denying State habeas corpus relief by the Superior Court of DeKalb County, Georgia are unreported. They

are, however, reprinted in the Appendices attached hereto.

## JURISDICTION

The judgment of the Fifth Circuit Court of Appeals, which holds that the felony provisions of Ga. Code Ann. § 74-9902(a) are unconstitutional as being in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, was entered on July 11, 1980. See Appendix C, infra. The Motion for Rehearing was denied per curiam on September 3, 1980. See Appendix B, infra.

A Notice of Appeal was timely filed with the Clerk for the Fifth Circuit Court of Appeals on September 19, 1980. See Appendix A, infra. This appeal is being docketed in this Court within ninety days from the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(b).

## THE CONSTITUTIONAL PROVISION INVOLVED AND THE STATE LAW UNDER ATTACK

The Constitutional Provision involved is the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution:

> ". . . no state shall . . . deny to any person within its jurisdiction the equal protection of the law."

The pertinent portion of the challenged State statute, Ga. Code Ann. § 74-9902(a), reads as follows:[1/]

> "If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother

---

1/ The entire Code Section is reprinted as Appendix G, infra.

> shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor."

## STATEMENT OF THE CASE

### I. RAISING THE FEDERAL QUESTION

The Appellee in this proceeding, Bobby H. Helms, was indicted by the Grand Jury of Muscogee County, Georgia on March 19, 1976, and was formally charged with abandoning his minor, legitimate child and leaving the State. On March 26, 1976, he entered a plea of guilty in the Superior Court of Muscogee County. Appellee's sentence was suspended on the condition that he pay $200.00 per month for the support and

maintenance of his child during her minority. On June 9, 1978, the Superior Court of Muscogee County determined that Mr. Helms had violated the conditions of his suspended sentence and consequently revoked the same.

On November 21, 1978, Mr. Helms filed a habeas corpus action in the Superior Court of DeKalb County, Georgia. By that action he challenged the constitutionality of the felony provisions of Ga. Code Ann. § 74-9902(a), arguing that his right to interstate travel, and his rights under the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, Section III, of the United States Constitution had been infringed by the classifications in said Code Section. The DeKalb County Superior Court denied relief, and ordered that the Appellee be remanded to State custody. (Appendix F, infra). Appellee's application to the Supreme Court

of Georgia for a certificate of probable cause to appeal was denied on February 27, 1979. (Appendix E, infra). Appellee then filed, on March 23, 1979, a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Middle District of Georgia, Columbus Division. In this federal petition, Mr. Helms raised the same constitutional issues that he had previously raised in the State courts.

The district court decided the case on the briefs which were submitted by both parties, and entered an order on May 4, 1979, denying relief. The Court found that the Appellee's rights were not violated under either the Equal Protection Clause or under the Privileges and Immunities Clause. (Appendix D, infra).

Appellee's certificate of probable cause to appeal to the Fifth Circuit Court of Appeals

was granted, and this case was docketed in the Fifth Circuit on July 9, 1979. Subsequently, after the filing of briefs and oral argument, the Fifth Circuit reversed the District Court for the Middle District of Georgia, and held that Ga. Code Ann. § 74-9902 violated the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. (Appendix C, infra). In its analysis of the statute, the Fifth Circuit also found that the statute infringed upon the Appellee's right to interstate travel, and consequently applied strict scrutiny to its evaluation. Thus, the Fifth Circuit considered and expressly addressed the equal protection issue; however, presumably because the Court found that ground alone was sufficient to grant relief, it did not address the privileges and immunities question.

## II. STATEMENT OF THE FACTS

In May of 1972, the Appellee, Bobby H. Helms and his wife, Sylvia were blessed with the birth of a daughter, Angela Sue Helms. The couple, their natural daughter, and two other children by the wife's former marriage lived in Georgia until August of 1973, when Mr. Helms was transferred by the United States Army to Germany. He was accompanied by his wife and children.

In November, 1974, marital difficulties developed which subsequently resulted in Mrs. Helms and the children moving back to the State of Georgia. After his discharge from the Army in June of 1975, Mr. Helms also returned to the State of Georgia. During that summer he and his wife were divorced, and as a consequence of the same, Mrs. Helms was given custody of the children, and Mr. Helms was ordered to pay $150.00 per month for the

maintenance and support of his daughter. Mr. Helms made no support payments, but abandoned his children and moved to the State of Alabama where he remained in continuous violation of his support obligations. No payments whatsoever were made to his ex-wife for child support during the entire time that the Appellee remained in Alabama.

On February 13, 1976, Mr. Helms was arrested in the State of Georgia for the offense of child abandonment, and on March 19, 1976, the Grand Jury of Muscogee County, Georgia formally charged him with the felony of abandoning his child and leaving the State. Appellee pled guilty to the charge on March 26, 1976, and received a three year suspended sentence conditioned upon his paying $200.00 per month for the support and maintenance of his child during her minority. Upon his release pursuant to his suspended sentence,

Mr. Helms again immediately left the State of Georgia and returned to Alabama, where he failed to make support payments in accordance with his suspended sentence. A bench warrant was then issued for his arrest.

Sometime thereafter, Mr. Helms moved to South Florida, and resided in the Fort Lauderdale area. On February 17, 1977, his estranged wife was murdered by her third husband. Eventually, Mr. Helms was successful in gaining custody of his daughter, Angela Sue, in the State of Florida. He remained in Florida until January of 1978, when he decided to move to Augusta, Georgia. Augusta authorities had become alerted to Mr. Helms' presence within the State when it had been called to their attention that he was threatening the safety and well being of his daughter. He was eventually arrested by authorities in Augusta on the outstanding bench warrant from

Muscogee County, and was transported back to Columbus, Georgia where his suspended sentence was revoked, and he was ordered to serve three years imprisonment. His daughter was thereafter placed with a relative in Columbus, Georgia.

Subsequently, Mr. Helms pursued relief under habeas corpus in state and federal courts. As previously noted, the Fifth Circuit Court of Appeals eventually reversed his conviction, thus resulting in this appeal.

## SUBSTANTIALITY OF THE QUESTION PRESENTED

Encompassed in the general issue on appeal, as applied to the factual situation in this case, is the question of whether a

state statute may constitutionally increase the criminal penalty from a misdemeanor to felony status, for an individual who commits a crime within the state and thereafter leaves the state. Under the challenged Georgia statute (Ga. Code Ann. § 74-9902) the underlying child abandonment must be found to be willful and voluntary; however, departure from the state, which in this case increased Appellee's potential punishment from a misdemeanor to a felony, need not be accompanied by any specific intent to flee nor intent to avoid prosecution.

In separate but similar cases, the Fifth Circuit Court of Appeals and the Georgia Supreme Court have rendered conflicting decisions addressing the questions posed on this appeal. Since the Fifth Circuit held that the Appellee's fundamental right to interstate travel had been infringed by the classifications

established in the Georgia statute at issue, said Court thus applied the strict scrutiny analysis, and held that the state interests were not sufficiently compelling to permit distinguishing between non-supporting parents within or without the State of Georgia. Applying the strict scrutiny rationale, the Fifth Circuit also recognized that the State of Georgia has adopted the Uniform Reciprocal Enforcement of Support Act (URESA), Ga. Code Ann. § 99-9A, et seq., which the Court found to be the less drastic means for the protection of state interests, as compared to the felony provisions of Ga. Code Ann. § 74-9902.

While this case was pending before the Fifth Circuit Court of Appeals, the Georgia Supreme Court decided Garren v. State, 245 Ga. 323, 264 S.E.2d 876 (1980). The factual situation of the defendant in Garren presented

an identical situation to that of the Appellee in the instant case. Both defendants were charged under Ga. Code Ann. § 74-9902 with abandoning their children and leaving the State, and both were convicted of felonies. Both defendants argued that the Georgia statute violated their constitutional right to interstate travel, and their rights under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. Contrary to the Fifth Circuit's holding, the Georgia Supreme Court found that a person who is charged with the commission of a crime within the State, does not have a constitutionally protected right of free travel. Id. at p. 323, citing, Mahon v. Justice, 127 U.S. 700 (1887) and Frisbie v. Collins, 342 U.S. 519 (1951); also see generally, California v. Byers, 402 U.S. 424, 435 (1971). Although the Fifth Circuit cited a possible distinguishing factor in Garren, supra (Helms v. Jones, supra at p. 213, fn. 11); nevertheless, a review of the Garren

opinion and the facts of this case does not support a conclusion that the cases are distinguishable. The cases appear to present identical situations.

Since this Court is the final arbitrator of federal constitutional law as decided by either the federal or the state courts, plenary review of this appeal is appropriate and necessary to alleviate the conflict between the Georgia Supreme Court and the Fifth Circuit Court of Appeals. See, Memorial Hospital v. Maricopa County, 415 U.S. 250, 253 (1974); Lego v. Twomey, 404 U.S. 477, 479 (1972).

Additionally, a review of the analysis which was utilized by the Fifth Circuit appears to be in conflict with prior decisions of this Court. The federal appellate court below apparently concluded that because the Appellee's right to interstate travel may have been infringed through the classifications in Ga. Code Ann. § 74-9902, then strict scrutiny was

automatically applicable, and the State was forced to demonstrate compelling interests to be protected by the classifications distinguished in the statute, as well as the utilization of the least drastic alternative for protecting said interests. This application by the Fifth Circuit failed to recognize that the right to interstate travel is not an absolute right, and before strict scrutiny is applicable, there must be some unreasonable infringement of that protected right. See, Memorial Hospital v. Maricopa County, supra, at p. 256-262; Shapiro v. Thompson, 394 U.S. 618, 630 (1969); Galvan v. Catherwood, 324 F.Supp. 1016, 1019 (S.D. N.Y. 1971), affirmed, 490 F.2d 1255, cert. den., 417 U.S. 936 (1974); United States v. Chalk, 441 F.2d 1227, 1283 (4th Cir. 1971), cert. den., 404 U.S. 743 (1971).

Assuming arguendo, the the Appellee in the instant case had the right to freedom of interstate travel notwithstanding the abandonment of his child, said right was not unreasonably infringed upon so as to invoke the strict scrutiny applied by the Fifth Circuit in its equal protection analysis. Thus, the Fifth Circuit properly should have examined Ga. Code Ann. § 74-9902 under the traditional, "rational state interest test."

The State of Georgia has numerous interests which justify the increased punishment for those individuals who, as did the Appellee, wilfully and voluntarily abandon their children and leave the State. Primarily there is the interest of the State in the protection of its minor children from the adverse impact of becoming public charges. The State also has an interest in the protection of the non-abandoning parent, the protection of the State's fiscal reserves from the burden of supporting children whose parents have

abandoned them, and the enhancement of the enforcement of State criminal laws.

The protection of all these interests is enhanced by the increased punishment provisions applicable to those parents who have left the State's jurisdiction. For example, in reality, states are much more likely to extradite individuals for felony violations rather than for misdemeanors. Additionally, simply locating the abandoning parent is easier when he is charged with a felony rather than a misdemeanor, because arrest warrants for felonies are placed on the National Crime Information Center computer listing, whereas misdemeanor offenses are not so listed. Even under the URESA statute, cited by the Fifth Circuit as an alternative remedy, locatic of the abandoning parent is often a problem to enforcement. Thus URESA is not always an available remedy, simply because the burden of locating

the abandoning parent often falls on the non-abandoning parent or child. Even if the abandoning parent is located, under URESA extradition may be averted, and the non-abandoning parent may be forced to travel to a foreign jurisdiction in an attempt to establish a valid support obligation. See, Ga. Code Ann. § 99-906a(b). Thus, URESA may not always be a viable alternative.

Moreover, Ga. Code Ann. § 74-9902 is a criminal statute, and the State of Georgia has an inherent interest in seeing that its criminal statutes are enforced. URESA is a social welfare statute, and cannot be used as a substitute for the state interests in enforcing its criminal laws.

The felony provisions of Ga. Code Ann. § 74-9902 only discourage migration between states if a parent has already abandoned his child, and is contemplating leaving the State's jurisdiction. If the parent has not

abandoned his child, the statute would impose no obstacle to migration, but would only discourage said abandonment once the parent has left the state. Those who travel and leave Georgia are unaffected by the statute unless they willfully and voluntarily decline to provide the means for their children to gain the bare necessities of life.

## CONCLUSION

Thus, this Court should note probable jurisdiction of this appeal in order to alleviate the conflict between the Georgia Supreme Court and the Fifth Circuit Court of Appeals, and to correct the erroneous decision of the Fifth Circuit Court of Appeals which has a substantial adverse impact on the interests of the State of Georgia.

Respectfully submitted,

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Attorney of Record for
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(Signatures Continued)

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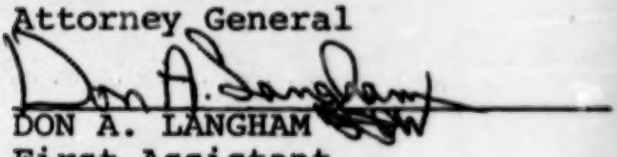

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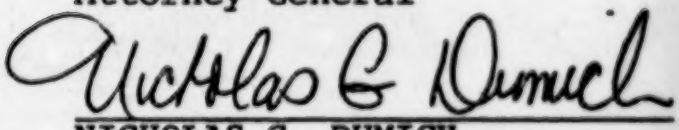

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## CERTIFICATE OF SERVICE

I, Nicholas G. Dumich, Attorney of Record for the Appellant, and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the Rules of the Supreme Court of the United States, I have served three copies of the foregoing Jurisdictional Statement and Appendices upon the Appellee by depositing same in the United States mail, with sufficient, first class postage affixed thereto, and addressed to counsel for Appellee as follows:

Mr. James C. Bonner, Jr.
Attorney at Law
Prisoner Legal Counseling
Project, University of
Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601

This is to further certify that all parties required to be served have been served.

This 21st day of November, 1980.

NICHOLAS G. DUMICH

# Appendices

# United States Court of Appeals

FIFTH CIRCUIT

GILBERT F. GANUCHEAU
CLERK

OFFICE OF THE CLERK

TEL 504-589-6
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September 19, 1980

Mr. Michael Rodak, Clerk
The Supreme Court of
the United States
Washington, D.C. 20543

No. 79-2596 - Bobby H. Helms vs.
Elie Jones

Dear Mr. Rodak:

Enclosed herewith is a copy of the notice of appeal filed on behalf of respondent-appellee on September 19, 1980 from this Court's opinion reversing and remanding the above cause entere on July 11, 1980.

As is the usual practice, we will await further advice from yo with respect to forwarding the record on appeal in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By Barry W. Stiebing
Barry W. Stiebing, Chief
Judicial Support Division-B

BWS:ts

cc: Mr. James C. Bonner, Jr.
Mr. Nicholas G. Dumich

APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

---

NO. 79-2596

---

BOBBY H. HELMS,

Petitioner-Appellant,

v.

ELIE JONES, WARDEN,

Respondent-Appellee.

---

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

---

Notice is hereby given that Elie Jones, the Respondent-Appellee above-named, hereby appeals to the Supreme Court of the United States, from the July 11, 1980, order of the United States Court of Appeals for the Fifth Circuit, which reverses the decision of the United States District Court for the Middle District of Georgia, Columbus Division, and which holds that the felony provision of Ga. Code Ann. § 74-9902 [1979 Supp.] is unconstitutional as being in violation of the Equal Protection

Clause of the Fourteenth Amendment to the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. § 1254(b).

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

DON A. LANGHAM
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CERTIFICATE OF SERVICE

This is to certify that I have this day served a copy of the foregoing attached Notice of Appeal upon:

Mr. James C. Bonner, Jr.
Attorney at Law
Prisoner Legal Counseling Project
University of Georgia School of Law
475 North Lumpkin Street
Athens, Georgia 30601

by depositing same in the United States mail, properly addressed and with sufficient postage prepaid. I further certify that all parties required to be served have been served.

This 16TH day of September, 1980.

Nicholas G. Dumich

NICHOLAS G. DUMICH

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

U.S. COURT OF APPEALS
FILED
SEP 3 1980
GILBERT E. GANUCHEAU
CLERK

NO. 79-2596

BOBBY H. HELMS,

Petitioner-Appellant,

versus

ELIE JONES, Warden,

Respondent-Appellee.

- - - - -

Appeal from the United States District Court for the Middle District of Georgia

- - - - -

ON PETITION FOR REHEARING

( SEPTEMBER 3, 1980 )

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

Thomas A. Clark
United States Circuit Judge

APPENDIX B

Form 703-2

**Bobby H. HELMS,**
**Petitioner-Appellant,**

**v.**

**Elie JONES, Warden,**
**Respondent-Appellee.**

**No. 79-2596.**

United States Court of Appeals,
Fifth Circuit.

July 11, 1980.

Georgia prisoner, convicted of felony child abandonment, filed a petition for a writ of habeas corpus. The United States District Court for the Middle District of Georgia, J. Robert Elliott, J., denied relief and petitioner appealed. The Court of Appeals, Thomas A. Clark, Circuit Judge, held that the Georgia statute making the crime of child abandonment a misdemeanor if the offense occurs in Georgia, while making the same crime a felony if the abandoning parent leaves the state of Georgia or abandons the child after leaving the state, denied equal protection and infringed upon the fundamental right to travel.

Reversed and remanded.

**Constitutional Law ⇐83(1), 250.1(2)**
**Parent and Child ⇐17(1)**

Georgia statute making crime of child abandonment a misdemeanor if offense occurs in Georgia, while making the same crime a felony if abandoning parent leaves state of Georgia or abandons child after leaving state, denied equal protection and infringed upon fundamental right to travel. Code Ga. § 74-9902; U.S.C.A.Const. Amend. 14.

---

Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

The appellant, unable to meet his child support obligations, left the State of Georgia in search of vocational training opportunities.[1] He was subsequently convicted of child abandonment under Ga.Code Ann. § 74-9902 [1979 Supp.] and sentenced to three years' imprisonment. After exhausting state remedies he file a petition for habeas corpus under 28 U.S.C. § 2254,[2] which was denied. On appeal he attacks the constitutionality of the statute. We think the petition should have been granted and reverse.

In essence, the statute[3] makes the crime of child abandonment a misde-

1. Stipulation of Facts, Record at 7.

2. The appellant's discharge from custody during the pendency of this appeal does not moot his claim. *Carafas v. LaValle*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

3. Ga.Code Ann. § 74-9902 [1979 Supp.] provides:

> If any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition, he or she shall be guilty of a misdemeanor. Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition, after leaving this State, he or she . . . shall be guilty of a felony . . .

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meanor if the offense occurs in Georgia, while making the same crime a felony if the abandoning parent leaves the State of Georgia or abandons the child after leaving the State. The statute thus creates two classes of crimes, the first a misdemeanor for child abandonment within the State, the second a felony for leaving the State after abandonment or abandonment after leaving the State. Those outside Georgia, merely by their presence outside the State, are exposed to risk of a felony conviction while Georgia residents are exposed only to risk of a misdemeanor conviction for the same actions. We find the fundamental right to travel [4] is infringed by this classification system.

Employing "traditional" equal protection analysis, we are required to scrutinize strictly statutes which impermissibly interfere with the exercise of fundamental rights. Strict scrutiny requires a state to have a compelling interest which outweighs the infringement.[5]

Georgia argues that the compelling state interests here are (1) the greater ease in extraditing persons accused of felonies than those accused of misdemeanors and (2) the protection of the State's fiscal integrity by the resulting enforcement of required parental child support. These arguments are unpersuasive since Georgia has in place, through its adoption of the Uniform Reciprocal Enforcement of Support Act (URESA), Ga.Code Ann. § 99–9A, et seq.,[6] an alternative means of enforcing child support obligations. Fiscal integrity of the State, support of minor children, and extradition of the nonpaying parent are all protected by this Act.[7]

We therefore find no sufficiently compelling state interest here which permits distinguishing between nonsupporting parents within or without the State of Georgia. There is no question that the statute violates equal protection. Further, even where a governmental purpose is legitimate, as here, the "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." [8] Again, URESA provides a less drastic means of achieving the ends sought by this overly broad statute.

The failure of the statute to require criminal intent as an element necessary for conviction is further indication of its overbreadth. Under the provision a person leaving the State fully intending to support his or her children, but unable to do so, commits a felony. A series of noncriminal acts can thus become a crime under the statute, subjecting the nonresident to extradition and felony

4. *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); and *U. S. v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966).

5. *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1972).

6. *See specifically* § 99–906a providing for interstate extradition.

7. The State's compelling interest argument further loses force by the failure of the State actively to enforce this statute. At oral argument appellee's counsel stated that he knew of no other prosecutions, while appellant's counsel knew of only three. Thus, the State has made only broadly conclusory statements about the necessity for this statute as part of a concerted attempt to solve a major state problem.

8. *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960).

conviction.[9] The advisability of a specific intent in statutes prohibiting the fundamental right to travel is illustrated by comparison to the federal "flight to avoid prosecution or giving testimony" statute, 18 U.S.C. § 1073. In examining the requisite elements for a conviction of that offense, where the statute itself requires intent, we have observed that "the gravamen of the offense charged . . . is that the defendant fled a state with *intent* to avoid prosecution therein, and *mere absence from the state* of prosecution, though it renders one a fugitive from justice for interstate rendition [citation omitted] is not sufficient proof of a federal crime."[10] (Emphasis supplied)

Accordingly, we REVERSE and REMAND for the issuance of the writ.[11]

9. While we recognize that certain regulatory offenses do not require scienter or a criminal state of mind and that the criteria for distinguishing between crimes that require a mental element and those that do not are elusive, we decline to find the "crime" of crossing state lines as the type of "public welfare" statute which dispenses with *mens rea* as an element of the offense. *See generally, Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and authorities cited therein.

10. *Barrow v. Owen*, 89 F.2d 476, 478 (5th Cir. 1937).

*See* Ark.Rev.Stat.Ann. § 41-2405 (1975) for an example of a nonsupport statute which provides for specific intent. It creates a misdemeanor for failure to provide support, except if "the person leaves or remains without the State of Arkansas *with purpose to avoid a legal duty* to provide support to another person . . ." (emphasis supplied), then the offense is a felony. The official comments to this statute are instructive. They state:

> Prior law apparently imposed felony liability merely upon a showing that the defendant left the state. The difficulty in apprehending a defendant is not a relevant grading criterion in the case of any other offense, and nonsupport should not be an exception. In addition, the Commission was concerned with the fact that in an increasingly mobile society people often leave the state for reasons completely unrelated to possible support obligations . . .

We, of course, do not rule here on the constitutionality of Arkansas' statute, but merely find its approach of assistance on this point.

*See also, In Re King*, 3 Cal.3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970), where the California Supreme Court found a statute similar to Georgia's constitutionally defective.

11. In preparing this opinion we learned first through LEXIS and then from the Georgia Attorney General's office that the Georgia Supreme Court decided on February 26, 1980, that in its view the questioned Georgia statute is constitutional. *See Garren v. The State*, 245 Ga. 323, 264 S.E.2d 876 (1980). There the court was faced with one who had already been charged with abandonment before leaving the State. There is no discussion of intent and whether the State proved that the defendant left Georgia with intent to avoid prosecution and intent not to support his children. Thus, the facts in *Garren* may reflect that he was fleeing with intent to avoid prosecution and payment of child support. Absent intent, the statute permits conviction of an innocent person contrary to the common law requirement of a culpable state of mind as an ingredient of a criminal offense. The history and reasons for this element being an essentiality of a criminal act are eloquently described by Justice Jackson in *Morissette, supra* note 9. The Georgia court's decision does not alter our opinion in this case. We cannot concur with the notion that *mere* presence in another state can make the same actions a felony that are a misdemeanor in Georgia—this is a denial of equal protection and an impermissible limitation on travel.

Adm. Office, U.S. Courts—West Publishing Company, Saint Paul, Minn.

FILED
at 11:55 M P M
MAY 4 1979
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

BOBBY H. HELMS, Petitioner
v.
WARDEN ELIE JONES, Respondent

CIVIL ACTION NO. 79-36-COL.

J U D G M E N T

Pursuant the Memorandum and Order of this Court dated May 4, 1979, and for the reasons stated therein, the petition for writ of habeas corpus is denied, and

JUDGMENT IS THEREFORE ENTERED IN FAVOR OF THE RESPONDENT.

This 4th day of May, 1979.

WALTER F. DOYLE, CLERK
By
Jonnie L. Adams
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF GEORGIA
COLUMBUS DIVISION

BOBBY H. HELMS,
Petitioner

v.

WARDEN ELIE JONES,
Respondent

CIVIL ACTION NO. 79-36-COL

FILED
at 10:50 A.M. P.M.
MAY 4 1979
Deputy Clerk, U.S. District Court
MIDDLE DISTRICT OF GEORGIA

MEMORANDUM AND ORDER

The Petitioner in this habeas corpus application is serving a three year sentence for the offense of child abandonment which was imposed by the Superior Court of Muscogee County, Georgia pursuant to Petitioner's guilty plea. In November, 1978 Petitioner filed an action seeking habeas corpus relief in the DeKalb County Superior Court in which Petitioner challenged the constitutionality of §74-9902 of the Georgia Code Annotated, this being Georgia's child abandonment statute. Following an evidentiary hearing the DeKalb County Superior Court denied relief and Petitioner's application to the Supreme Court of Georgia for review of the trial court's ruling was denied. The Petitioner then filed a petition for the writ of habeas corpus in this Court and in this proceeding he makes the same contentions made in the state court.

There is no controversy concerning the pertinent facts. The only question presented is a legal one. Upon consideration, this Court determines that the Georgia statute referred to is not unconstitutional for any of the reasons urged by the Petitioner and that Petitioner's rights were not violated under the equal protection clause of the Fourteenth Amendment or under Article IV,

Application No. 884

SUPREME COURT OF GEORGIA

ATLANTA, February 27, 1979

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed:

BOBBY H. HELMS V. ELIE JONES, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,

CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

Clerk.

APPENDIX E

Section II, of the United States Constitution. No evidentiary hearing is indicated and it is directed that the pending petition for the writ be dismissed as being without merit.

IT IS SO ORDERED this 4th day of May, 1979.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

FILED
DEKALB CO. GA.
JAN 9 2 45 PM '79
CHANDLER BRIDGES
CLERK SUPERIOR COURT

IN THE SUPERIOR COURT OF DEKALB COUNTY

STATE OF GEORGIA

| | | |
|---|---|---|
| BOBBY H. HELMS, | * | |
| Petitioner, | * | CIVIL ACTION NO. 9510 |
| v. | * | |
| ELIE JONES, WARDEN STONE MOUNTAIN CORRECTIONAL INSTITUTE, | * | HABEAS CORPUS |
| Respondent. | * | |

O R D E R

The above-captioned matter having come before this Court for a hearing on December 13, 1978, and after hearing oral testimony and considering documentary evidence submitted in this case, this Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

On March 26, 1976, Petitioner pled guilty in the Superior Court of Muscogee County to the offense of child abandonment. On the same date he was sentenced to three years imprisonment, such sentence being suspended on the condition Petitioner pay $200.00 per month for the support and maintenance of his child during her minority. On June 9, 1978, the Superior Court of Muscogee County found that Petitioner violated the conditions of said suspended sentence and consequently revoked the same.

Petitioner filed this action on November 21, 1978, seeking relief under habeas corpus. The only issue raised in his petition challenges the constitutionality of Ga. Code Ann. § 74-9902,

Georgia's child abandonment statute. Petitioner asserts that the wording of a portion of the statute violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

At the hearing conducted on December 13, 1978, Petitioner testified in his own behalf and was represented by counsel, Attorney James Bonner of the Prisoner Legal Counseling Project. Both parties also submitted brief memoranda in support of their positions.

## CONCLUSIONS OF LAW

The challenged portion of Ga. Code Ann. § 74-9902 reads as follows:

> "If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the

penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor."

Although the Equal Protection Clause prohibits the State from arbitrarily discriminating among persons within its jurisdiction, some differences in treatment are permissible if the object of the state action can be rationally justified. Furthermore, there is a presumption in favor of the constitutionality of state statutes and a statutory discrimination will not be set aside if any statement of facts may be conceived to justify it. McGowan v. Maryland, 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Absent invidious discrimination a rationally based classification does not run afoul of the clause. Massachusetts Board of Retirement v. Muriga, 427 U.S. 207, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

Likewise, the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution bars discrimination against citizens of other states where there is no substantial reason for the discrimination except for the fact that they are citizens of other states. See, Slaughter-House Cases, 16 Wall 36, 21 L.Ed. 394 (1872). However, the constitutional provision does not necessarily bar all disparity in treatment in cases where there are perfectly valid independent reasons for it. This was recognized in Toomer v. Witsell, 334 U.S. 385, 68 S.Ct. 1157, 92 L.Ed. 1460 (1947), reh. den. 335 U.S. 837 (1948) where the Supreme Court stated:

"[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the

principle that the states should have considerable leeway in analyzing local evils and prescribing appropriate cures." Toomer at p. 396

In balancing the State interests served by the statute against the disparity of treatment imposed upon the Petitioner, this Court concludes that the State interests should prevail.

The State has an inherent interest in promoting the parental care and support of minor dependent children within the state, and in providing an inexpensive, speedy means to require that support. It becomes much easier to avoid the obligations of child support and escape prosecution for such when one leaves the State and removes himself from State jurisdiction. The more cumbersome process of extradition must then be utilized resulting in increased difficulty in the enforcement of Code § 74-9902.

The increased penalty is imposed under the statutory provision on two classes of individuals: (1) those who have abandoned their children and who have left the state, and (2) those who have left the state and who then choose to wilfully and voluntarily abandon their children. The increased penalty promotes the protection of minor dependent children by discouraging those who are in the first group from evading their parental obligations by fleeing the state. Thus, they are more apt to remain subject to State jurisdiction, and State interests can more easily be served. The statute discourages those who are in the second classification from abandoning their children once they have left the State's jurisdiction and have diminished the opportunity for enforcement of the support obligations. For this class of individuals the statute does not discourage interstate movement, but does discourage the abandonment of dependent minors by those who have increased

the likelihood of successfully evading their support obligations by leaving the State's jurisdiction.

Lastly the State has an interest in protecting its fiscal reserves from the financial burden of supporting children whose parents have abandoned them.

The aforementioned State interests are sufficient to overcome Petitioner's claims that his rights under the Equal Protection Clause of the Fourteenth Amendment and under the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution have been violated.

Thus, based on the findings of fact contained in this Order, and after considering all evidence and testimony presented, this Court concludes that none of Petitioner's constitutional rights have been violated and that all of his allegations are without merit.

It is thus ORDERED and ADJUDGED that Petitioner be remanded to the custody of the Respondent, Warden for the service of the remainder of the sentence challenged in this proceeding.

SO ORDERED, this 9th day of ~~December~~ January, 1978.

Curtis A. Tillman

CURTIS TILLMAN
Superior Court Judge
Stone Mountain Judicial Circuit

**74-9902 (116 P. C.) Abandonment of child**

(a) If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor. The wife and husband shall be competent witnesses, in such cases to testify for or against the other. The mother and the alleged father of the child, either legitimate or illegitimate, shall be competent witnesses in such cases to testify for or against each other, notwithstanding the fact that such testimony may relate to adultery by either the mother or the father which may have resulted in the conception of the child. A child thus abandoned by the father or mother shall be considered to be in a dependent condition when the father or mother charged with the offense does not furnish sufficient food, clothing or shelter for the needs of the child. The offense of abandonment shall be and is hereby declared to be a continuing offense. Former acquittal or conviction of said offense shall not be a bar to further prosecution therefor under this section, if it shall be made to appear that said child was in a dependent condition as defined herein for a period of 30 days prior to the commencement of prosecution.

(b) Provided, however, that any person, upon conviction of the third offense for violating the provisions of this section, shall be guilty of a felony and shall, upon conviction thereof, be imprisoned in the penitentiary for not less than one nor more than three years, which felony shall not be reducible to a misdemeanor by any judge presiding at the trial as provided in section 27-2501.

(c) Provided, however, if during the trial of any person charged with the offense defined in this section, such person contends that he or she is not the father or mother, as the case may be, of the child alleged to have been abandoned, the trial judge shall charge the jury that if its verdict is for the acquittal of such person, and that its reason for so finding is that such person is not the father or mother of the child alleged to have been abandoned, that its verdict shall so state, or if the person charged with the offense defined in this section is tried before the court without the intervention of the jury and the court renders a verdict of acquittal based on the contention of such person that he or she is not the father or mother, as the case may be, of the child alleged to have been abandoned, the trial judge shall so state this fact in his verdict of acquittal. In the event the verdict of the jury or the court shall be for acquittal of such person, and its reason for so doing is that such person is not the father or mother of the child alleged to have been abandoned, such person cannot thereafter again be tried for the offense of abandoning said child, and said verdict shall be a bar to all civil and criminal proceedings attempting to compel such person to support said child.

(d) In prosecutions under this section, when the child is illegitimate, and the accused father is convicted, the accused father shall be required by the court to pay the reasonable medical expenses paid by or incurred on behalf of the mother due to the birth of the child.

(e) The accused father and the mother of the illegitimate child may enter into a written agreement providing for future support of the child by regular periodic payments to the mother until such child reaches age 18 years, marries, or becomes self-supporting: Provided, however, such agreement shall not be binding on either party until it has been approved by the court having jurisdiction to try pending cause.

(f) Upon the trial of the accused father under this section, it shall be no defense that the accused father has never supported the child.

(g) In prosecutions under this section, when the child is illegitimate, the venue of the offense shall be in the county in which the child and the mother are domiciled at the time of the swearing out of the arrest warrant, but if the child and the mother are domiciled in different counties, venue shall be in the county in which the child is domiciled.

(h) In the trial of any abandonment proceeding in which the question of parentage arises, regardless of any presumptions with respect to parentage, the accused father may request a paternity blood test and agree and arrange to pay for same; and in such cases the court before which the matter may be brought, upon pretrial motion of the defendant, shall order that the alleged parent, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged parent, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. Upon receipt of a motion and the entry of an order under the provisions of this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged parent cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged parent is not the natural parent.

(2) The court shall require the defendant requesting the blood tests and comparisons pursuant to this subsection to be initially responsible for any of the expenses thereof. Upon the entry of a verdict incorporating a finding of parentage or nonparentage, the court shall tax the expenses for blood tests and comparisons, in addition to any fees for expert witnesses whose testimonies supported the admissibility thereof, as costs.

(Acts 1866, p. 151; 1878-9, pp. 66, 67; 1907, p. 57; 1941, pp. 481, 483; 1946, pp. 63, 64; 1952, pp. 173, 174; 1956, p. 800; 1960, pp. 952, 953; 1965, p. 197; 1967, pp. 453, 454; 1973, pp. 697, 699; 1976, p. 1015; 1980, pp. 1374, 1378, eff. July 1, 1980.)

NO. 80-850

FILED
MAR
ALEXANDER
CL

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

ELIE JONES, Warden, Stone Mountain Correctional Institution,

*Appellant,*

v.

BOBBY H. HELMS,

*Appellee.*

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## JOINT APPENDIX

CAROL ATHA COSGROVE
Assistant Attorney General
132 State Judicial Building
Atlanta, Georgia 30334
(404) 656-3336

*Counsel for Appellant*

JAMES C. BONNER, JR.
Prisoner Legal Counseling Project
University of Georgia
School of Law
475 Lumpkin Street
Athens, Georgia 30601
(404) 542-4241

*Counsel for Appellee*

APPEAL DOCKETED NOVEMBER 24, 1980
PROBABLE JURISDICTION NOTED
JANUARY 26, 1981

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*Attached as Exhibits to both the Petition for Habeas Corpus and Answer.

## CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 23, 1979:

Appellee's petition for a writ of habeas corpus filed in the United States District Court for the Middle District of Georgia, Columbus Division.

April 17, 1979:

Appellant's answer filed.

May 4, 1979:

Memorandum, Order and Judgment for Appellant, denying habeas corpus relief, filed in the United States District Court.

May 24, 1979:

Appellee's Notice of Appeal to the Fifth Circuit Court of Appeals, filed in the United States District Court.

May 24, 1979:

Order filed, by United States District Court Judge J. Robert Elliott, denying Appellee's application for a certificate of probable cause to appeal.

July 6, 1979:

Order filed by United States Circuit Judge Thomas Gibbs Gee, in the United States Court of Appeals for the Fifth Circuit, granting Appellee's application for a certificate of probable cause to appeal.

July 11, 1980:

Judgment entered in the Fifth Circuit Court of Appeals, reversing the United States District Court and remanding for the issuance of habeas corpus relief.

July 25, 1980:
Motion for Rehearing filed in the Fifth Circuit Court of Appeals.

September 3, 1980:
Order filed in the Fifth Circuit Court of Appeals denying the Motion for Rehearing.

September 19, 1980:
Notice of Appeal to the United States Supreme Court filed in the Fifth Circuit Court of Appeals.

November 24, 1980:
Appellant's jurisdictional Statement docketed in the United States Supreme Court.

December 24, 1980:
Appellee's Motion to Affirm filed in the United States Supreme Court.

January 26, 1981:
Order filed in the United States Supreme Court noting probable jurisdiction and granting Appellee's motion for leave to proceed *in forma pauperis*.

STATE OF GEORGIA, COUNTY OF MUSCOGEE:

IN THE SUPERIOR COURT OF SAID COUNTY, FEBRUARY TERM 1976. THE GRAND JURORS selected, chosen and sworn for the county of MUSCOGEE to wit:

I, W. J. Gunby, Foreman

2. C. O. Calhoun
3. ~~W. R. Storey~~
4. James C. McDonald
5. Charles R. Williams
6. Abram Siegal
7. Crawford C. Clinkscales
8. William B. Poovey
9. D. P. Jones
10. Robert E. Safford
11. Charles D. Coleman
12. Dr. William Henry Shaw
13. Jack B. Straus
14. Linda Bryan
15. Jack W. Pope
16. Thomas A. McRae
17. Rosa Parker
18. Samuel C. Bishop
19. James W. Rachels
20. Clarence L. Skinner, Jr.
21. Cathleen R. Hamilton
22.
23.

in the name and behalf of the citizens of Georgia, charge and accuse BOBBY H. HELMS with the offense of:— ABANDONMENT for that said accused, in the county of MUSCOGEE and State of Georgia, did on the 30th day of June, 1974 wilfully and voluntarily abandon his minor legitimate child, to-wit: Angela Sue Helms, age Three (3) years, leaving her in a dependent condition, and the said Bobby H. Helms did leave the State of Georgia,

contrary to the laws of said State, the good order, peace and dignity thereof.

E. MULLINS WHISNANT
District Attorney

Special Presentment

The Defendant Bobby H. Helms, having been arraigned, and having been furnished with a copy of the Indictment and with a list of witnesses on whose testimony the charge against him her is founded, pleads not guilty.

Min 19, Folio 213

/s/ DOUGLAS C. PULLEN District Attorney

/s/ WILLIAM CAIN Deft's Attorney

/s/ BOBBY H. HELMS Defendant

The Defendant _____
waives arraignment and pleads not guilty.

_____ District Attorney

_____ Deft's Attorney

_____ Defendant

36817

Sol's. No. 11 Clerk's No. 142

MUSCOGEE SUPERIOR COURT

P93/26/76

THE STATE

VS.

BOBBY H. HELMS

P. GUILTY MAR 26 1976

ABANDONMENT - 3 yrs. susp. cons
on 2 int. $200/mo. thru, J.P.C.
suspended sentence enforced

E. MULLINS WHISNANT

District Attorney

TRUE BILL

Foreman

Special Presentment

COURT REPORTER

M. Mixon

**PLEA OF GUILTY AND WAIVER OF TRIAL BY JURY**
**OFFICE OF SOLICITOR GENERAL**
**SUPERIOR COURT—**
**MUSCOGEE COUNTY, GEORGIA**

March 26, 1976

I, Bobby H. Helms, do hereby state that it is my desire and intention to enter a PLEA OF GUILTY to the charge of Abandonment of which I have been accused and charged with having committed on or about the 30th day of June, 1974.

My reason for entering this PLEA OF GUILTY to the above named offense(x) is that I did, in fact, commit the said offense(x). I have been advised by my attorney, whose name appears below, of my constitutional rights which are as follows:

(1) I am entitled to enter a plea of not guilty and to be given a trial by jury;

(2) I am entitled to remain absolutely silent and make no statement at all to any authorities;

(3) I am entitled to have an attorney appointed to defend me if I should elect to plead not guilty and have a trial by jury;

(4) If I cannot afford to hire a lawyer, the court will appoint me an attorney free of charge;

(5) Any PLEA OF GUILTY which is entered by me at this time must be freely and voluntarily made by me and that no promise of any kind can be made to me; and

(6) The nature of the offense of Listed Above has been explained to me by my attorney and the mini-

mum and maximum punishment possible for such offense has been explained to me.

I can read and write, and I have read the above statement which is a PLEA OF GUILTY AND WAIVER OF TRIAL BY JURY and I understand it completely and it is the truth insofar as my guilt of the named charges is concerned and insofar as my understanding my constitutional rights is concerned, SO HELP ME GOD.

SIGNED IN OPEN COURT

BY: /s/ Bobby H. Helms
Defendant—charged with the offense(x) of Abandonment

BY: /s/ William Cain
Attorney for defendant—who is court appointed for purposes of advising defendant of his (xxx) constitutional rights prior to defendant entering a PLEA OF GUILTY to the above named charge(x)

BY: /s/ Douglas C. Pullen
Solicitor General,
Superior Court
Muscogee County, Georgia

GEORGIA, MUSCOGEE COUNTY:

IN MUSCOGEE SUPERIOR COURT

| | |
|---|---|
| THE STATE<br>vs<br>BOBBY H. HELMS | FEBRUARY Term, 1976<br>ABANDONMENT<br>NO 36817 and<br>PLEA of guilty. |

WHEREUPON, it is ordered and adjudged by the Court that the Defendant BOBBY H. HELMS be taken from the bar of this Court to the jail of Muscogee County, and be there safely kept until a sufficient guard is sent for him from the Georgia Penitentiary, and be then delivered to, and be by said guard taken to said Penitentiary, or such place as the Director of Corrections may direct, where he, the said defendant be confined at labor for the full term of not less than three years, to be suspended, so long as and on the conditions that he pay to the Adult Probation Officer of said County, the sum of Two Hundred ($200.00) each month commencing May 1, 1976, and payable each and every month during the minority of the Defendant's minor child, to-wit, Angela Sue Helms, to be used in the support and maintenance of said child.

This the 26th day of March, 1976.

Min 19 Folio 214

/s/ JOHN H. LAND
Judge Superior Court

GEORGIA MUSCOGEE COUNTY

CLERK'S OFFICE SUPERIOR COURT

I Kathleen Massengale DEPUTY CLERK OF THE SUPERIOR COURT OF MUSCOGEE COUNTY, GEORGIA, SAID COURT BEING A COURT OF RECORD IN AND FOR SAID COUNTY, DO HEREBY CERTIFY THAT THE FOREGOING IS A TRUE AND CORRECT COPY OF Ind, Plea, & Sentence, and Order Enforcing Suspended Sentence, HAD IN THE CASE OF The State vs. Bobby H. Helms AS OF FILE AND RECORD IN SAID OFFICE.

GIVEN UNDER MY HAND, WITH THE SEAL OF SAID COURT AFFIXED THIS 8th DAY OF December, 1978.

/s/ KATHLEEN MASSENGALE

[SEAL]

DEPUTY CLERK,
SUPERIOR COURT
MUSCOGEE COUNTY,
GEORGIA

| | |
|---|---|
| GEORGIA, MUSCOGEE COUNTY<br>THE STATE OF GEORGIA<br>VS.<br>BOBBY H. HELMS | IN MUSCOGEE SUPERIOR COURT<br>JUNE TERM 1978<br>ABANDONMENT NO. 36817 AND PLEA OF GUILTY |

**ORDER ENFORCING SUSPENDED SENTENCE**

On March 26, 1976, in said Court, for the offense set out above, the defendant, Bobby H. Helms was sentenced to serve three years in the Georgia Penitentiary, under the jurisdiction of the State Board of Corrections. However, it was provided that said sentence stand suspended on the conditions that he pay to the Adult Probation Officer of Muscogee County the sum of two hundred dollars ($200.00) per month commencing May 1, 1976, and payable each and every month during the minority of the defendant's minor child, to-wit, Angela Sue Helms, to be used in the support and maintenance of said minor child.

Now, on this day, at a hearing to determine whether the defendant, Bobby H. Helms has violated the conditions of said suspended sentence, and after hearing evidence in the matter, it appears to the Court that the defendant has violated the conditions of said suspended sentence.

WHEREUPON, it is ordered and adjudged by the Court that the defendant, Bobby H. Helms be required to serve said three-year sentence within the confines of the Georgia Penitentiary, under the jurisdiction of the State Board of Corrections, to be computed according to law.

This the 9th day of June, 1978.

COURT REPORTER
/s/ M. Mixon

/s/ John H. Land
JUDGE,
MUSCOGEE COUNTY
SUPERIOR COURT

DATE_____

Min 22, Folio 594

**IN THE SUPERIOR COURT OF DEKALB COUNTY**
**STATE OF GEORGIA**

[Filed DeKalb Co. Ga., Jan. 9, 2:49 P.M., '79;
Chandler Bridges, Clerk, Superior Court.]

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| BOBBY H. HELMS,<br>*Petitioner,*<br>v.<br>ELIE JONES, WARDEN<br>STONE MOUNTAIN CORRECTIONAL INSTITUTE,<br>*Respondent.* | CIVIL ACTION<br>NO. 9510<br><br>HABEAS CORPUS |

## ORDER

The above-captioned matter having come before this Court for a hearing on December 13, 1978, and after hearing oral testimony and considering documentary evidence submitted in this case, this Court makes the following findings of fact and conclusions of law:

## FINDINGS OF FACT

On March 26, 1976, Petitioner pled guilty in the Superior Court of Muscogee County to the offense of child abandonment. On the same date he was sentenced to three years imprisonment, such sentence being suspended on the condition Petitioner pay $200.00 per month for the support and maintenance of his child during her minority. On June 9, 1978, the Superior Court of Muscogee County found that Petitioner violated the conditions of said suspended sentence and consequently revoked the same.

Petitioner filed this action on November 21, 1978, seeking relief under *habeas corpus*. The only issue raised in his petition challenges the constitutionality of Ga. Code Ann. § 74-9902, Georgia's child abandonment statute. Peti-

tioner asserts that the wording of a portion of the statute violates the Equal Protection Clause of the Fourteenth Amendment and the Privileges and Immunities Clause of Article IV, Section 2 of the United States Constitution.

At the hearing conducted on December 13, 1978, Petitioner testified in his own behalf and was represented by counsel, Attorney James Bonner of the Prisoner Legal Counseling Project. Both parties also submitted brief memoranda in support of their positions.

## CONCLUSIONS OF LAW

The challenged portion of Ga. Code Ann. § 74-9902 reads as follows:

> "If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor."

Although the Equal Protection Clause prohibits the State from arbitrarily discriminating among persons within its jurisdiction, some differences in treatment are permissible if the object of the state action can be rationally justified. Furthermore, there is a presumption in favor of the constitutionality of state statutes and a statutory

discrimination will not be set aside if any statement of facts may be conceived to justify it. *McGowan v. Maryland*, 366 U.S. 420, 425, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961). Absent invidious discrimination a rationally based classification does not run afoul of the clause. *Massachusetts Board of Retirement v. Muriga*, 427 U.S. 207, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

Likewise, the Privileges and Immunities Clause of Article IV, § 2 of the United States Constitution bars discrimination against citizens of other states where there is no substantial reason for the discrimination except for the fact that they are citizens of other states. *See, Slaughter-House Cases*, 16 Wall 36, 21 L.Ed. 394 (1872). However, the constitutional provision does not necessarily bar all disparity in treatment in cases where there are perfectly valid independent reasons for it. This was recognized in *Toomer v. Witsell*, 334 U.S. 385, 68 S.Ct. 1157, 92 L.Ed. 1460 (1947), *reh. den.* 335 U.S. 837 (1948) where the Supreme Court stated:

> "[T]he inquiry in each case must be concerned with whether such reasons do exist and whether the degree of discrimination bears a close relation to them. The inquiry must also, of course, be conducted with due regard for the principle that the states should have considerable leeway in analyzing local evils and prescribing appropriate cures." *Toomer* at p. 396

In balancing the State interests served by the statute against the disparity of treatment imposed upon the Petitioner, this Court concludes that the State interests should prevail.

The State has an inherent interest in promoting the parental care and support of minor dependent children within the state, and in providing an inexpensive, speedy

means to require that support. It becomes much easier to avoid the obligations of child support and escape prosecution for such when one leaves the State and removes himself from State jurisdiction. The more cumbersome process of extradition must then be utilized resulting in increased difficulty in the enforcement of Code § 74-9902.

The increased penalty is imposed under the statutory provision on two classes of individuals: (1) those who have abandoned their children and who have left the state, and (2) those who have left the state and who then choose to wilfully and voluntarily abandon their children. The increased penalty promotes the protection of minor dependent children by discouraging those who are in the first group from evading their parental obligations by fleeing the state. Thus, they are more apt to remain subject to State jurisdiction, and State interests can more easily be served. The statute discourages those who are in the second classification from abandoning their children once they have left the State's jurisdiction and have diminished the opportunity for enforcement of the support obligations. For this class of individuals the statute does not discourage interstate movement, but does discourage the abandonment of dependent minors by those who have increased the likelihood of successfully evading their support obligations by leaving the State's jurisdiction.

Lastly the State has an interest in protecting its fiscal reserves from the financial burden of supporting children whose parents have abandoned them.

The aforementioned State interests are sufficient to overcome Petitioner's claims that his rights under the Equal Protection Clause of the Fourteenth Amendment and under the Privileges and Immunities Clause of Ar-

ticle IV, § 2 of the United States Constitution have been violated.

Thus, based on the findings of fact contained in this Order, and after considering all evidence and testimony presented, this Court concludes that none of Petitioner's constitutional rights have been violated and that all of his allegations are without merit.

It is thus ORDERED and ADJUDGED that Petitioner be remanded to the custody of the Respondent, Warden for the service of the remainder of the sentence challenged in this proceeding.

SO ORDERED, this 8th day of January, 1978.

/s/ CURTIS V. TILLMAN

CURTIS TILLMAN
Superior Court Judge
Stone Mountain Judicial Circuit

**IN THE DEKALB SUPERIOR COURT**
**STATE OF GEORGIA**

BOBBY H. HELMS,
*Petitioner,*
VS.
ELIE JONES, WARDEN,
*Respondent.*

CIVIL NO. _____

## STIPULATION OF FACTS

On March 15, 1969, Petitioner, Bobby H. Helms, while serving in the Army and stationed in Columbus, Georgia, married Sylvia Smith. Shortly thereafter he served a tour of duty in Vietnan (sic) and returned to Georgia in July of 1970 and acquired some property. On May 11, 1972, a daughter, Angela Sue Helms, was born to the couple. The Petitioner's wife also had custody of two other children by a former marriage.

The family lived in Georgia until August of 1973 when he was transferred to Germany. His wife and the children accompanied him there. However, marital difficulties broke out and in November of 1974 his wife and children returned to Georgia. After his discharge from the Army in June, 1975, the Petitioner also returned to Georgia where he enrolled in a vocational training program. The couple remained separated.

That summer the Petitioner's wife filed for separation and the Petitioner was directed to pay $150.00 per month as child support. Without making such payments, the Petitioner, who by then had lost his property in Georgia, left the State and moved back to his native State, Alabama. He testified that he did not do so in order to avoid his domestic obligations but because certain vocational training opportunities, for which he was ineligible in Co-

lumbus, were available to him under VA there.

He remained in Alabama until February, 1976. Unbeknown to Petitioner, his estranged wife had secured a warrant for his arrest because of his continuous failure to pay child support. On February 13, 1976, while visiting his child in Columbus, he was arrested.

The grand jury of Muscogee County, in a special presentment returned on March 19, 1976, formally charged him with the felony of abandoning his child and leaving the State. The Petitioner pleaded guilty in the Superior Court on March 26, 1976, and was sentenced to a three-year suspended sentence conditioned on his paying $200.00 per month as child support. Upon his realease (sic), he returned to Ozark, Alabama, but when he failed to make support payments under the court order a bench warrant was issued for his arrest.

The Petitioner next moved to South Florida and took up residence in the Fort Lauderdale area. On February 17, 1977, his estranged wife was murdered in Columbus by her third husband. Shortly thereafter, temporary custody of all of her three children, including Angela Sue, was given to her first husband who brought them to his home in Tallahassee, Florida. There the Petitioner brought an action in the juvenile court seeking custody of his own child, proceedings which were complicated by Georgia's contemporaneous efforts to have him extradited to Columbus on a probation violation warrant for child abandoment. He was finally successful in gaining custody of his child on April 27, 1977, but only after the juvenile court judge had received assurances from the Florida Governor's office that he would not be extradited back to Georgia under the circumstances.

The Petitioner remained in Florida until January of 1978, when he decided to move to Augusta, Georgia.[1]

On January 21, 1978, the Georgia Department of Family and Children Services in Augusta received a letter from the Florida Department of Health and Rehabilitation Services which alerted them to the Petitioner's arrival in Augusta. The letter was prompted by an incident which occurred in a Greyhound bus station in Jacksonville, Florida. According to the Florida authorities, the Petitioner had been arrested for public drunkenness and was observed striking his child. His daughter had been taken to an emergency shelter but was later returned to him after an informal hearing in Jacksonville. Because of this incident and other alleged incidents of child abuse and neglect which had been reported in Florida, the Florida caseworkers had become concerned about Angela Sue's welfare, and when they learned that he was taking her to Augusta they forewarned the Georgia authorities.

Upon investigating the Petitioner's activities in Augusta, the Georgia Department of Family and Children Services initially received satisfactory information. However, a short time later they received reports that the Petitioner had a drinking problem which threatened the safety and well-being of his daughter. After further in-

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[1] Concerned over a case in which the parent was confined for abandoning a child whom he later assumed custody of, the court below adjourned the evidentiary hearing in order that the Respondent could investigate the facts further. The following paragraphs indicate what his proof would have been. However, because of the dubious relevance of the entire factual background to the specific constitutional issue raised, and because the court was satisfied that no miscarriage of justice had necessarily occurred, the court and the parties' counsel agreed that no further hearing would be necessary and that the parties could simply stipulate what the State's rebuttal evidence would have indicated.

vestigation and further complaints, they acted to secure an emergency court order by which they assumed custody of Angela Sue. They also learned around this time of the outstanding warrant in Muscogee County. He was arrested under it, transported back to Columbus, and sentenced to serve three years after a June 9, 1978 hearing in which his suspended sentence was revoked.

Angela Sue has been placed with a relative and is living in Columbus, Georgia.

Thereafter, on November 21, 1978, the Petitioner filed this action in the DeKalb Superior Court seeking a writ of habeas corpus.

/s/ JAMES C. BONNER, JR. (2/9/79)

JAMES C. BONNER, JR.
Counsel for the Petitioner

/s/ NICHOLAS G. DUMICH 2-9-79

NICHOLAS G. DUMICH
Assistant Attorney General
Counsel for the Respondent

CURTIS V. TILLMAN
Judge, Stone Mountain Judicial Circuit

**Application No. 884**

SUPREME COURT OF GEORGIA

ATLANTA, February 27, 1979

The Honorable Supreme Court met pursuant to adjournment. The following order was passed:

BOBBY H. HELMS V. ELIE JONES, WARDEN

Upon consideration of the application for a certificate of probable cause to appeal filed in this case, it is ordered that it be hereby denied.

SUPREME COURT OF THE STATE OF GEORGIA,
CLERK'S OFFICE, ATLANTA,

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

JOLINE B. WILLIAMS, Clerk.

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF GEORGIA**
**COLUMBUS DIVISION**

[Filed at 10:45 A.M., Mar. 23, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

BOBBY H. HELMS,
*Petitioner,*
vs.
WARDEN ELIE JONES,
*Respondent.*

Civil No. 79-36-Col.

**PETITION FOR A WRIT OF HABEAS CORPUS**

Bobby H. Helms, by counsel, respectfully petitions this court on the following basis for a writ of habeas corpus directed to the Respondent.*

A. The Respondent is the Warden of the Stone Mountain Correctional Institution, Stone Mountain, Georgia.

B. There, he is holding the Petitioner under [3] a three-year sentence which [1] the Muscogee Superior Court imposed upon him on [2] 26 March 1976 following his [5, 6] plea of guilty to an indictment for [4] felony child abandonment, that is, abandoning his child and leaving the State (Georgia Code Ann. 74-9902 [1978 Supp.]).

C. The sentence was originally suspended on condition that the Petitioner make certain child support payments. When he failed to do so, the trail (sic) court ordered the suspension revoked on 9 June 1978.

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*The bracketed numerals below and the materials immediately following them correspond to the paragraphs of the model form approved for use in this District. For clarity, some of the model's paragraphs have been somewhat rearranged and combined.

D. Accurate copies of the indictment, plea, suspended sentence, and order of revocation are attached as Exhibits A, B, C, and D.

E. [8-10] The Petitioner took no direct appeal from these proceedings. [10-11(a)(3)] However, in November 1978, he sought a State writ of habeas corpus in the Dekalb Superior Court claiming that "the statute under which [he] was charged, convicted, and sentenced . . . (Code Ann. 74-9902), insofar as it permits a difference in penal treatment which turns solely upon exercise of the constitutionally securred (sic) right to travel and to reside outside of the State, is unconstitutional as a violation of both the Equal Protection Clause of the 14th Amendment and the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution of the United States."

F. [11(a)(4-6)] Following an evidentiary hearing (See Exhibit E, an accurate copy of the parties' stipulation of the evidence), on 8 January 1979, the Dekalb Superior Court denied relief, sustained the statute, and ordered the Petitioner remanded to custody. An accurate copy of its order is attached as Exhibit F.

G. [11(d)] The Petitioner sought to appeal to the Supreme Court of Georgia but it declined to entertain the case. Exhibit G is an accurate copy of its order declining to grant a certificate of probable cause.

H. Georgia Code Ann. 74-9902 (Georgia Laws 1965, p. 197, as amended) which provides for increased penalties and felony treatment if an accused has exercised his right to travel interstate and to reside outside of Georgia, without reference to any specific intent or purpose of avoiding his child support obligations, by its overbreadth offends the Equal Protection Clause of the 14th Amendment.

I. The penalty scheme created by Georgia Code Ann. 74-9902 impermissibly discriminates against citizens of other States by branding them as felons simply because they live and reside outside of Georgia, regardless of whether they have innocently exercised their rights to do so, and thus it violates the Privileges and Immunities Clause of Article IV, Section 2 of the Constitution.

WHEREFORE the Petitioner respectfully requests that this court direct the Respondent to answer this petition, issue the writ, and order that he be discharged or afforded such further relief as law and justice require.

/s/ JAMES C. BONNER, JR.

JAMES C. BONNER, JR.
*Counsel for the Petitioner*

UNIVERSITY OF GEORGIA SCHOOL OF LAW
LEGAL AID AND DEFENDER SOCIETY
PRISONER LEGAL COUNSELING PROJECT
475 North Lumpkin Street
Athens, Georgia 30601

(404) 542-4241

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF GEORGIA**
**COLUMBUS DIVISION**

[Filed at 8:20 A.M., Apr. 17, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

BOBBY H. HELMS,
*Petitioner,*
v.
WARDEN ELIE JONES,
*Respondent.*

CIVIL ACTION
NO. 79-36-COL.

**ANSWER AND RESPONSE**

COMES NOW, Elie Jones, Respondent in the above-styled action, by and through the Attorney General for the State of Georgia, who makes this Answer and Response to the habeas corpus petition of Bobby H. Helms.

1.

Petitioner is presently serving a three-year sentence for the offense of child abandonment, which was originally imposed by the Superior Court of Muscogee County, Georgia on March 26, 1976, pursuant to Petitioner's guilty plea. Petitioner's sentence was suspended on the condition that he pay $200.00 per month for the support and maintenance of his child during her minority. On June 9, 1978, said Superior Court of Muscogee County found that Petitioner violated the conditions of said suspended sentence and consequently revoked the same. (Copies of Petitioner's indictment, guilty plea, sentence and order enforcing the revocation of his suspended sentence are attached as Exhibit A).

2.

On November 21, 1978, Petitioner filed an action seeking relief under habeas corpus in the DeKalb County Superior Court. By that action Petitioner challenged the constitutionality of Ga. Code Ann. § 74-9902, Georgia's child abandonment statute.

3.

Following an evidentiary hearing, the DeKalb County Superior Court denied relief and ordered the Petitioner remanded to custody. (A copy of the DeKalb Superior Court's order is attached as Exhibit B).

4.

Petitioner's application to the Supreme Court of Georgia for review of the trial court's habeas corpus ruling was denied. (Exhibit C).

5.

Petitioner then filed, on March 23, 1979, a petition for a writ of habeas corpus in this Court.

**EXHAUSTION**

6.

Respondent admits that the allegations raised in Petitioner's application for habeas corpus relief were also raised by Petitioner in his petition filed in the Superior Court of DeKalb County in November of 1978. Said petition being denied in the Superior Court, and later application for review by the Supreme Court of Georgia also being denied, it thus appears that Petitioner has exhausted all of his available state remedies.

## EXHIBITS AVAILABLE

7.

The following exhibits are attached in support of this Answer and Response: (1) Respondent's Exhibit A—a copy of Petitioner's indictment, guilty plea, suspended sentence and revocation of his suspended sentence; (2) Respondent's Exhibit B—a copy of the order of the DeKalb County Superior Court denying habeas corpus relief; (3) Exhibit C—a copy of the Supreme Court of Georgia's denial of Petitioner's application for a certificate of probable cause to appeal; Respondent's Exhibit D—a copy of the agreed upon stipulation of facts which were before the DeKalb County Superior Court.

## ANSWERING PARTICULARLY THE ALLEGATIONS OF THE PETITION:

8a.

Respondent denies those allegations listed in the petition which assert that Ga. Code Ann. § 74-9902 (Ga. Laws 1965, p. 197, as amended) unconstitutionally impinges on Petitioner's right to interstate travel, and additionally denies that said statute violates the equal protection clause of the Fourteenth Amendment.

8b.

Respondent denies that Ga. Code Ann. § 74-9902 violates the privileges and immunities clause of Art. IV, Sec. II of the United States Constitution.

**SEPARATE DEFENSE**

9.

Respondent asserts that the petition for writ of habeas corpus filed by Bobby H. Helms, fails to state a claim upon which relief can be granted.

WHEREFORE, because an examination of the challenged Georgia statute, Ga. Code Ann. § 74-9902, reveals that said statute does not deny Petitioner any of his constitutional rights, this Court should deny Petitioner an evidentiary hearing, and should dismiss this instant petition for a writ of habeas corpus as being without merit.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Executive Assistant
Attorney General

/s/ DON A. LANGHAM
DON A. LANGHAM
First Assistant
Attorney General

/s/ JOHN C. WALDEN
JOHN C. WALDEN
Senior Assistant
Attorney General

/s/ NICHOLAS G. DUMICH
NICHOLAS G. DUMICH
Staff Assistant
Attorney General

Please serve:

NICHOLAS G. DUMICH
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3499

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF GEORGIA**
**COLUMBUS DIVISION**

[Filed at 10:50 A.M., May 4, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

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| BOBBY H. HELMS,<br>*Petitioner,*<br>v.<br>WARDEN ELIE JONES,<br>*Respondent.* | CIVIL ACTION<br>NO. 79-36-COL |

## MEMORANDUM AND ORDER

The Petitioner in this habeas corpus application is serving a three year sentence for the offense of child abandonment which was imposed by the Superior Court of Muscogee County, Georgia pursuant to Petitioner's guilty plea. In November, 1978 Petitioner filed an action seeking habeas corpus relief in the DeKalb County Superior Court in which Petitioner challenged the constitutionality of §74-9902 of the Georgia Code Annotated, this being Georgia's child abandonment statute. Following an evidentiary hearing the DeKalb County Superior Court denied relief and Petitioner's application to the Supreme Court of Georgia for review of the trial court's ruling was denied. The Petitioner then filed a petition for the writ of habeas corpus in this Court and in this proceeding he makes the same contentions made in the state court.

There is no controversy concerning the pertinent facts. The only question presented is a legal one. Upon consideration, this Court determines that the Georgia statute referred to is not unconstitutional for any of the reasons urged by the Petitioner and that Petitioner's rights were

not violated under the equal protection clause of the Fourteenth Amendment or under Article IV, Section II, of the United States Constitution. No evidentiary hearing is indicated and it is directed that the pending petition for the writ be dismissed as being without merit.

IT IS SO ORDERED this 4th day of May, 1979.

J. ROBERT ELLIOTT
UNITED STATES DISTRICT JUDGE

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF GEORGIA**
**COLUMBUS DIVISION**

[Filed at 11:55 A.M., May 4, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

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| BOBBY H. HELMS,<br>*Petitioner,*<br>v.<br>WARDEN ELIE JONES,<br>*Respondent.* | CIVIL ACTION<br>NO. 79-36-COL. |

## JUDGMENT

Pursuant the Memorandum and Order of this Court dated May 4, 1979, and for the reasons stated therein, the petition for writ of habeas corpus is denied, and

JUDGMENT IS THEREFORE ENTERED IN FAVOR OF THE RESPONDENT.

This 4th day of May, 1979.

WALTER F. DOYLE, CLERK

By /s/ JONNIE L. ADAMS
JONNIE L. ADAMS
Deputy Clerk

**IN THE UNITED STATES DISTRICT COURT**
**FOR THE MIDDLE DISTRICT OF GEORGIA**
**COLUMBUS DIVISION**

[Filed at 1:10 P.M., May 24, 1979,
Jonnie L. Adams, Deputy Clerk, U.S. District Court,
MIDDLE DISTRICT OF GEORGIA]

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| BOBBY H. HELMS, *Petitioner*, vs. WARDEN ELIE JONES, *Respondent.* | CIVIL NO. 79-36-COL |

**NOTICE OF APPEAL**

Bobby H. Helms, by counsel, hereby respectfully gives notice of his appeal from the final order and judgment entered herein on 4 May 1979 dismissing his petition under 28 U.S.C. 2254.

The Clerk will please submit this to the District Court for consideration of a certificate of probable cause pursuant to Rule 22(b), F.R.A.P., and transmit the entire record (which consists only of the pleadings and the final order) to the Clerk of the Fifth Circuit Court of Appeals.

This 21st day of May, 1979.

/s/ JAMES C. BONNER, JR.

JAMES C. BONNER, JR.
*Counsel for the Petitioner*

UNIVERSITY OF GEORGIA SCHOOL OF LAW
LEGAL AID AND DEFENDER SOCIETY
PRISONER LEGAL COUNSELING PROJECT
475 North Lumpkin Street
Athens, Georgia 30601
(404) 542-4241

**Bobby H. HELMS,**
**Petitioner-Appellant,**
**v.**
**Elie JONES, Warden,**
**Respondent-Appellee.**
**No. 79-2596.**

United States Court of Appeals,
Fifth Circuit.
July 11, 1980.

James C. Bonner, Jr., Athens, Ga., for petitioner-appellant.

Nicholas G. Dumich, Asst. Atty. Gen., Atlanta, Ga., for respondent-appellee.

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Appeal from the United States District Court for the Middle District of Georgia.

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

THOMAS A. CLARK, Circuit Judge:

The appellant, unable to meet his child support obligations, left the State of Georgia in search of vocational training opportunities.[1] He was subsequently convicted of child abandonment under Ga.Code Ann. § 74-9902 [1979 Supp.] and sentenced to three years' imprisonment. After exhausting state remedies he filed a petition for habeas corpus under 28 U.S.C. § 2254,[2] which was denied.

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[1] Stipulation of Facts, Record at 7.

[2] The appellant's discharge from custody during the pendency of this appeal does not moot his claim. *Carafas v. LaValle*, 391 U.S. 234, 88 S.Ct. 1556, 20 L.Ed.2d 554 (1968).

On appeal he attacks the constitutionality of the statute. We think the petition should have been granted and reverse.

In essence, the statute[3] makes the crime of child abandonment a misdemeanor if the offense occurs in Georgia, while making the same crime a felony if the abandoning parent leaves the State of Georgia or abandons the child after leaving the State. The statute thus creates two classes of crimes, the first a misdemeanor for child abandonment within the State, the second a felony for leaving the State after abandonment or abandonment after leaving the State. Those outside Georgia, merely by their presence outside the State, are exposed to risk of a felony conviction while Georgia residents are exposed only to risk of a misdemeanor conviction for the same actions. We find the fundamental right to travel[4] is infringed by this classification system.

Employing "traditional" equal protection analysis, we are required to scrutinize strictly statutes which impermissibly interfere with the exercise of fundamental rights. Strict scrutiny requires a state to have a compelling interest which outweighs the infringement.[5]

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[3] Ga.Code Ann. § 74-9902 [1979 Supp.] provides:

> If any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition, he or she shall be guilty of a misdemeanor. Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child . . . leaving it in a dependent condition, after leaving this State, he or she . . . shall be guilty of a felony . . .

[4] *Shapiro v. Thompson*, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969); and *U. S. v. Guest*, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966).

[5] *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974); *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1972).

Georgia argues that the compelling state interests here are (1) the greater ease in extraditing persons accused of felonies than those accused of misdemeanors and (2) the protection of the State's fiscal integrity by the resulting enforcement of required parental child support. These arguments are unpersuasive since Georgia has in place, through its adoption of the Uniform Reciprocal Enforcement of Support Act (URESA), Ga.Code Ann. § 99-9A, et seq.,[6] an alternative means of enforcing child support obligations. Fiscal integrity of the State, support of minor children, and extradition of the nonpaying parent are all protected by this Act.[7]

We therefore find no sufficiently compelling state interest here which permits distinguishing between nonsupporting parents within or without the State of Georgia. There is no question that the statute violates equal protection. Further, even where a governmental purpose is legitimate, as here, the "purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." [8] Again, URESA provides a less drastic means of achieving the ends sought by this overly broad statute.

The failure of the statute to require criminal intent as an element necessary for conviction is further indication of its overbreadth. Under the provision a person leaving

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[6] *See specifically* § 99-906a providing for interstate extradition.

[7] The State's compelling interest argument further loses force by the failure of the State actively to enforce this statute. At oral argument appellee's counsel stated that he knew of no other prosecutions, while appellant's counsel knew of only three. Thus, the State has made only broadly conclusory statements about the necessity for this statute as part of a concerted attempt to solve a major state problem.

[8] *Shelton v. Tucker*, 364 U.S. 479, 488, 81 S.Ct. 247, 252, 5 L.Ed.2d 231, 237 (1960).

the State fully intending to support his or her children, but unable to do so, commits a felony. A series of non-criminal acts can thus become a crime under the statute, subjecting the nonresident to extradition and felony conviction.[9] The advisability of a specific intent in statutes prohibiting the fundamental right to travel is illustrated by comparison to the federal "flight to avoid prosecution or giving testimony" statute, 18 U.S.C. § 1073. In examining the requisite elements for a conviction of that offense, where the statute itself requires intent, we have observed that "the gravamen of the offense charged . . . is that the defendant fled a state with *intent* to avoid prosecution therein, and *mere absence from the state* of prosecution, though it renders one a fugitive from justice for interstate rendition [citation omitted] is not sufficient proof of a federal crime." [10] (Emphasis supplied)

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[9] While we recognize that certain regulatory offenses do not require scienter or a criminal state of mind and that the criteria for distinguishing between crimes that require a mental element and those that do not are elusive, we decline to find the "crime" of crossing state lines as the type of "public welfare" statute which dispenses with *mens rea* as an element of the offense. *See generally, Morissette v. United States*, 342 U.S. 246, 72 S.Ct. 240, 96 L.Ed. 288 (1952), and authorities cited therein.

[10] *Barrow v. Owen*, 89 F.2d 476, 478 (5th Cir. 1937).

*See* Ark.Rev.Stat.Ann. § 41-2405 (1975) for an example of a non-support statute which provides for specific intent. It creates a misdemeanor for failure to provide support, except if "the person leaves or remains without the State of Arkansas *with purpose to avoid a legal duty* to provide support to another person . . ." (emphasis supplied), then the offense is a felony. The official comments to this statute are instructive. They state:

> Prior law apparently imposed felony liability merely upon a showing that the defendant left the state. The difficulty in apprehending a defendant is not a relevant grading criterion in the case of any other offense, and nonsupport should not be an exception. In addition, the Commission was concerned with the fact that in an increasingly mobile society people often leave the state for reasons completely unrelated to possible support obligations . . .

Accordingly, we REVERSE and REMAND for the issuance of the writ.[11]

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We, of course, do not rule here on the constitutionality of Arkansas' statute, but merely find its approach of assistance on this point.

*See also, In Re King*, 3 Cal.3d 226, 90 Cal. Rptr. 15, 474 P.2d 983 (1970), where the California Supreme Court found a statute similar to Georgia's constitutionally defective.

[11] In preparing this opinion we learned first through LEXIS and then from the Georgia Attorney General's office that the Georgia Supreme Court decided on February 26, 1980, that in its view the questioned Georgia statute is constitutional. *See Garren v. The State*, 245 Ga. 323, 264 S.E.2d 876 (1980). There the court was faced with one who had already been charged with abandonment before leaving the State. There is no discussion of intent and whether the State proved that the defendant left Georgia with intent to avoid prosecution and intent not to support his children. Thus, the facts in *Garren* may reflect that he was fleeing with intent to avoid prosecution and payment of child support. Absent intent, the statute permits conviction of an innocent person contrary to the common law requirement of a culpable state of mind as an ingredient of a criminal offense. The history and reasons for this element being an essentiality of a criminal act are eloquently described by Justice Jackson in *Morissette, supra* note 9. The Georgia court's decision does not alter our opinion in this case. We cannot concur with the notion that *mere* presence in another state can make the same actions a felony that are a misdemeanor in Georgia—this is a denial of equal protection and an impermissible limitation on travel.

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

---

**NO. 79-2596**

---

[U. S. Court of Appeals, Filed Sep. 3, 1980,
Gilbert F. Ganucheau, Clerk]

BOBBY H. HELMS,
*Petitioner-Appellant,*

versus

ELIE JONES, Warden,
*Respondent-Appellee.*

---

**Appeal from the United States District Court for the Middle District of Georgia**

---

**ON PETITION FOR REHEARING**

(SEPTEMBER 3, 1980)

Before INGRAHAM, RONEY and THOMAS A. CLARK, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ THOMAS A. CLARK
United States Circuit Judge

Form 703-2

**IN THE**

**UNITED STATES COURT OF APPEALS**

**FOR THE FIFTH CIRCUIT**

---

**NO. 79-2596**

---

BOBBY H. HELMS,
*Petitioner-Appellant,*

v.

ELIE JONES, WARDEN,
*Respondent-Appellee.*

---

## NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

---

Notice is hereby given that Elie Jones, the Respondent-Appellee above-named, hereby appeals to the Supreme Court of the United States, from the July 11, 1980, order of the United States Court of Appeals for the Fifth Circuit, which reverses the decision of the United States District Court for the Middle District of Georgia, Columbus Division, and which holds that the felony provision of Ga. Code Ann. § 74-9902 [1979 Supp.] is unconstitutional as being in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

This appeal is taken pursuant to 28 U.S.C. § 1254(b).

Respectfully submitted,

Please serve:

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/s/ DON A. LANGHAM
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/s/ JOHN C. WALDEN
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Senior Assistant
Attorney General

/s/ NICHOLAS G. DUMICH
NICHOLAS G. DUMICH
Assistant Attorney General

*(Certificate of Service omitted in printing.)

**SUPREME COURT OF THE UNITED STATES**

**No. 80-850**

Elie Jones, Warden, Stone Mountain Correctional Institution,

*Appellant,*

v.

Bobby H. Helms

APPEAL from the United States Court of Appeals for the Fifth Circuit.

The statement of jurisdiction in this case having been submitted and considered by the Court, in this case probable jurisdiction is noted.

January 26, 1981

## CERTIFICATE OF SERVICE

I, CAROL ATHA COSGROVE, one of the attorneys for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served opposing counsel in this action with three copies of the foregoing Appendix, by depositing three copies of the same in the United States Mail, with first class postage prepaid, addressed as follows:

James C. Bonner, Jr.
Prisoner Legal Counseling Project
University of Georgia
School of Law
475 North Lumpkin Street
Athens, Georgia 30601

CAROL ATHA COSGROVE
Assistant Attorney General

This ____ day of March, 1981.

RECEIVED
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DEC 29 1980
MICHAEL RODAK, JR., C

80-850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

---

ELIE JONES, WARDEN,
STONE MOUNTAIN CORRECTIONAL
INSTITUTION,

Appellant

versus

BOBBY H. HELMS

Appellee.

---

On Appeal from the United States Court of Appeals

for the Fifth Circuit

---

# MOTION TO AFFIRM

---

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NO. 80-850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER 1980 TERM

---

ELIE JONES, WARDEN,

STONE MOUNTAIN CORRECTIONAL INSTITUTION,

Appellant

VS.

BOBBY HELMS,

Appellee

---

MOTION TO AFFIRM

I. Jurisdiction

Appellate jurisdiction is properly in this Court under 28 U.S.C. 1254(b) and the appeal is timely under Rules 10 and 12 of this Court.

II. Why This Court Should Summarily Affirm

A.

Georgia Code Ann 74-9902 makes it a crime for a parent to abandon his child within the state. It divides all parents who are subject to falling under its jeopardy into two classes for purposes of punishment if ever convicted. Those who remain within the state, at least short of a third conviction, are subject to misdemeanor confinement for 12 months. Those who leave the state are subject to felony imprisonment for up to three years.

From the standpoint of any parent's jeopardy under the statute, the classification turns directly upon the exercise of the right to interstate travel, a right secured by the Constitution, United States v. Guest, 383 U.S. 745, 86 S.Ct. 1170, 16 L.Ed.2d 239 (1966), Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), Memorial Hospital v. Maricopa County, 415 U.S. 250, 94 S.Ct. 1076, 39 L.Ed.2d 306 (1974). Under well-settled constitutional principles, the classification is therefore subject to "strict scrutiny" under the Equal Protection Clause. That is, the state is obliged to demonstrate that its infringement of the right to travel is reasonably necessary in order to advance some substantial public interest, Shapiro v. Thompson, supra, Bullock v. Carter, 405 U.S. 134, 92 S.Ct. 849, 31 L.Ed.2d 92 (1972).

There is no question that Georgia has a substantial interest in discouraging parents from abandoning their children within her borders, conduct which threatens their welfare, overburdens their remaining custodian, and can possibly make them public charges. Nor is there any real quarrel with the proposition that fleeing her jurisdiction could aggravate the offense and make it more difficult for Georgia to secure her interest.

The problem under the strict scrutiny test is whether enhancing the potential penalty indiscriminately for parents who leave the state sweeps too broadly and "unnecessarily burden[s] or restrict[s] constitutionally protected activity," Dunn v. Blumstein, 405 U.S. 333, 343, 92 S.Ct. 995, 31 L.Ed.2d 274 (1972). Given the constitutional nature of the right implicated, the question is whether the statute is precisely enough tailored to serve the state's legitimate interests, with minimal infringement of the right to travel, Zablocki v. Redhail, 434 U.S. 374, 388, 98 S.Ct. 673, 54 L.Ed.2d 618 (1978).

With respect to these aspects of the inquiry, the constitutional definciency of the law is that "departure from the state, which...increase[s]...the potential punishment from a misdemeanor

to a felony, need not be accompanied by any specific intent to flee nor intent to avoid prosecution" (Jurisdictional Statement, p. 13). Thus a parent who leaves Georgia for the most innocent or laudable reasons--even to secure training or work so that he can support his family--risks being treated like a fugitive who leaves to compound his crime. The motives of both are irrelevant. Both are felons if convicted of child abandonment.

In effect, the Statute discourages any parent from leaving the state. This is neither reasonable, given the constitutional nature of the right involved, nor necessary, given the state's legitimate concerns.

Georgia could easily secure her interests with constitutional precision by affixing a particular culpable intent to any departure from the state, and this would not be an unreasonable restriction of the right to travel. Cf., Barrow v. Owen, 89 F.2d 476 (5th Cir 1937). See Helms v. Jones, 621 F.2d 211, 213 (5th Cir 1980). As noted below, id. at 212, other less constitutionally onerous means are also available to secure her interests in the event a parent has left the state, irrespective of his motives. See Georgia Code Ann 99-9A (URESA).

What Georgia may not do is make the simple exercise of the right to travel, for whatever reason or motive, the distinguishing element of a felony. It is simply beyond any state's power to attach a penalty to a constitutional right in this manner, Harmon v. Forssenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50 (1965), or so needlessly chill its exercise, United States v. Jackson, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968).

B.

Georgia has not mounted any serious defense of the statute against strict scrutiny, in effect conceding that it cannot be done. Her position is that the "rational connection" test is the appropriate standard for its examination.

To evade the application of the strict scrutiny which the Court of Appeals found to be clearly mandated, here on appeal Georgia has invoked the rationale of her Supreme Court in Garren v. State, 245 Ga. 323, 264 S.E.2d 876 (1980), "that a person who is charged with the commission of a crime within the state does not have a constitutionally protected right of travel" (Jursidictional Statement, p. 15).[-1)]

Further, her argument runs, the Court below erred when it "failed to recognize that the right to interstate travel is not an absolute right, and [that] before strict scrutiny is applicable there must be some unreasonable infringement of that protected right" (Jurisdictional Statement, p. 17). Finally her position is that the enhanced penalty is not unreasonable because it affects only those who have "wilfully and voluntarily decline[d] to provide the means for their children to gain the bare necessities of life." (id., p. 2).

While it is true that the rights of those who stand accused of crimes, including the right to travel freely, may reasonably be restricted, e.g., United States v. Cook, 428 F.2d 460 (5th Cir. 1970), and that no one has a constitutional right to be a fugitive, Garren v. State, supra at 325, the facial vice of Georgia Code Ann. 74-0092 is that it is not so limited. It was a mistake for the Supreme Court of Georgia to have sustained it as if it were. The statute plainly reaches parents who are not necessarily fugitives, who never intended to be, and who have simply exercised their rights to travel. It discourages out-of-state travel by any parent.

---

-1) In Garren, the parent was formally charged before he left the state. The Appellee was not charged until after he left Georgia "in search of vocational training opportunities," Helms v. Jones, supra at 212, Jurisdictional Statement, pp. 9-10.

Few constitutional rights are absolute,-2) but that fact hardly exempts from strict scrutiny any statute which directly and significantly infringes upon such a right. See Zablocki v. Redhail, supra at 386, Carrington v. Rash, 380 U.S. 89, 85 S.Ct. 775, 13 L.Ed.2d 675 (1965). If it did, the test could hardly be invoked at all.

Finally, the statute is not reasonable simply because only a few convicted criminals may ever actually suffer its enhanced penalty. In the first place, even from such a narrow perspective of the law's impact, even those ultimately adjudged guilty are entitled among themselves to the equal protection of the laws. The disparity of treatment between those who left and those who stayed, for intrinsically the same offense, is no less unreasonable, Skinner v. Oklahoma ex rel. Williamson, 316 U.S. 535, 62 S.Ct. 1110, 86 L.Ed. 1655 (1942).

But more importantly, the statute's impact and its reasonableness cannot be viewed as if it were restricted just to the guilty. It chills every parent's right to leave Georgia or to reside elsewhere. It reaches out indiscriminately to brand as a potential felon any parent who travels outside of the state for any reason. It does so simply because they had the temerity or need to exercise a right vouchsafed by the Constitution.

III. Conclusion

Under the settled precedents in this Court, there is no substantial or novel question involved in this appeal which warrants further argument. This Court should summarily affirm the judgement below.

James C. Bonner, Jr.
JAMES C. BONNER, JR.
Counsel for the Appellee

-2) This Court has characterized the right of interstate travel as "virtually unqualified," Califano v. Torres, 435 U.S. 1, 4n., 98 S.Ct. 906, 55 L.Ed.2d 65 (1978).

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

---

ELIE JONES, WARDEN,
STONE MOUNTAIN CORRECTIONAL
INSTITUTION,

Appellant

versus

BOBBY H. HELMS,

Appellee

---

On Appeal from the United States Court of Appeals

for the Fifth Circuit

---

CERTIFICATE OF SERVICE

---

I, JAMES C. BONNER, JR., A member of the Bar of this Court, hereby certify that on this 19th day of December 1980, I mailed first class a copy of the attached Motion for Leave to Proceed in Forma Pauperis to the counsel for the Appellant, Assistant Attorney General Nicholas Dumich, 132 State Jducial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334

James C. Bonner, Jr.

JAMES C. BONNER, JR.
Attorney for Appellee

UNIVERSITY OF GEORGIA SCHOOL OF LAW
PRISONER LEGAL COUNSELING PROJECT
475 North Lumpkin Street
Athens, Georgia 30601
(404)542-4241

5. He has no dependents since his child is in foster care.

6. He has not previously moved for or been granted leave to proceed in forma pauperis.

Bobby H. Helms
BOBBY H. HELMS

Sworn to and subscribed
before me this 12
day of December,
1980.

Angela Akins
NOTARY PUBLIC

Notary Public, State of Florida at Large
My Commission Expires May 24, 1984
Bonded Thru Troy Fain Insurance Inc.

DEC 29 1980
OFFICE OF THE CLERK
SUPREME COURT, U.S.

# 80-850

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

ELIE JONES, WARDEN
STONE MOUNTAIN CORRECTIONAL
INSTITUTION,

Appellant

versus

BOBBY H. HELMS

Appellee

On Appeal from the United States Court of Appeals

for the Fifth Circuit

## MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Bobby H. Helms, by counsel, respectfully moves this Court for leave to file the attached motion to affirm, and to proceed thereafter, in forma pauperis without prepayment of the fees and costs normally required.

His affidavit of poverty is attached.

James C. Bonner, Jr.

JAMES C. BONNER, JR.
COUNSEL FOR THE APPELLEE

PRISONER LEGAL COUNSELING PROJECT
UNIVERSITY OF GEORGIA SCHOOL OF LAW
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

---

ELIE JONES, WARDEN,
STONE MOUNTAIN CORRECTIONAL
INSTITUTION,

Appellant

versus

BOBBY H. HELMS,

Appellee

---

On Appeal from the United States Court of Appeals

for the Fifth Circuit

---

CERTIFICATE OF SERVICE

---

I, JAMES C. BONNER, JR., a member of the Bar of this Court, hereby certify that on this 19th day of December, 1980, I mailed first class a copy of the attached motion to affirm to the counsel for the Appellant, Assistant Attorney General, Nichola Dumich, 132 State Judicial Building, 40 Capital Square, S.W., Atlanta, Georgia 30334.

James C. Bonner, Jr.

JAMES C. BONNER, JR.
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IN THE SUPREME COURT

OF

THE UNITED STATES

| | |
|---|---|
| ELIE JONES, WARDEN, | : |
| | : |
| STONE MOUNTAIN CORRECTIONAL INSTITUTION, | : |
| Appellant | : |
| | : |
| | : |
| | : |
| VS. | : |
| | : |
| | : |
| | : |
| BOBBY H. HELMS, | : |
| | : |
| Appellee | : |

AFFIDAVIT OF POVERTY

Bobby H. Helms, being first duly sworn, identifies himself as the Appellee in the above-styled case and states upon his oath that because of his poverty he is unable to pay the costs of printing his motion to affirm though he believes in good faith that he is entitled to the redress he has won below.

He further states upon his oath:

1. That he is employed as a truck driver with the Hardrives Company, 847 N.W. 8th Avenue, Ft. Lauderdale, Florida 33311, where, before taxes and other deductions, he earns $190.00 each week.

2. Within the last 12 months, he has had no other income from any other source.

3. He has no checking account but he does have a modest ($150) savings account.

4. His only significant personal property is a 1971 Chevrolet automobile worth approximately $300.00.

No. 80-850

IN THE

# Supreme Court of the United States

October Term, 1980

ELIE JONES, Warden, Stone Mountain Correctional Institution,

*Appellant,*

v.

BOBBY H. HELMS,

*Appellee.*

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR APPELLANT


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PLEASE SERVE:
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## QUESTON PRESENTED

Whether, under the Equal Protection Clause of the Fourteenth Amendment, a State, in furtherance of its compelling interests in protecting its children and in enforcing its criminal laws, may enact a statute which provides that a person who commits the crime of child abandonment, before or after leaving the State, is guilty of a felony, whereas a person who commits the crime of child abandonment without leaving the State is guilty of a misdemeanor?

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No. 80-850

IN THE

# Supreme Court of the United States

October Term, 1980

ELIE JONES, Warden, Stone Mountain Correctional Institution,

*Appellant,*

v.

BOBBY H. HELMS,

*Appellee.*

## APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## BRIEF FOR APPELLANT

### OPINION BELOW

The opinion of the Court of Appeals is reported at 621 F.2d 211. A copy of the opinion is set forth in the Joint Appendix at A.32.

### JURISDICTION

The decision of the Court of Appeals was entered on July 11, 1980. A notice of appeal was filed on September 19, 1980, and this Court noted probable jurisdiction on January 26, 1981.

The jurisdiction of this Court is conferred by Title 28, United States Code, Section 1254(b).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

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UNITED STATES CONSTITUTION

Section I, Fourteenth Amendment to the Constitution:

> SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GEORGIA STATUTES

Ga. Code § 74-9902:

> **74-9902 (116 P.C.) Abandonment of child**
>
> (a) If any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, he or she, as the case may be, shall be guilty of a misdemeanor: Provided, however, if any father or mother shall wilfully and voluntarily abandon his or her child,

either legitimate or illegitimate, leaving it in a dependent condition, and shall leave this State, or if any father or mother shall wilfully and voluntarily abandon his or her child, either legitimate or illegitimate, leaving it in a dependent condition, after leaving this State, he or she, as the case may be, shall be guilty of a felony and shall, upon conviction, be imprisoned in the penitentiary for not less than one nor more than three years, which shall be reducible to a misdemeanor. The wife and husband shall be competent witnesses, in such cases to testify for or against the other. The mother and the alleged father of the child, either legitimate or illegitimate, shall be competent witnesses in such cases to testify for or against each other, notwithstanding the fact that such testimony may relate to adultery by either the mother or the father which may have resulted in the conception of the child. A child thus abandoned by the father or mother shall be considered to be in a dependent condition when the father or mother charged with the offense does not furnish sufficient food, clothing or shelter for the needs of the child. The offense of abandonment shall be and is hereby declared to be a continuing offense. Former acquittal or conviction of said offense shall not be a bar to further prosecution therefor under this section, if it shall be made to appear that said child was in a dependent condition as defined herein for a period of 30 days prior to the commencement of prosecution.

(b) Provided, however, that any person, upon conviction of the third offense for violating the provisions of this section, shall be guilty of a felony and shall, upon

conviction thereof, be imprisoned in the penitentiary for not less than one nor more than three years, which felony shall not be reducible to a misdemeanor by any judge presiding at the trial as provided in section 27-2501.

(c) Provided, however, if during the trial of any person charged with the offense defined in this section, such person contends that he or she is not the father or mother, as the case may be, of the child alleged to have been abandoned, the trial judge shall charge the jury that if its verdict is for the acquittal of such person, and that its reason for so finding is that such person is not the father or mother of the child alleged to have been abandoned, that its verdict shall so state, or if the person charged with the offense defined in this section is tried before the court without the intervention of the jury and the court renders a verdict of acquittal based on the contention of such person that he or she is not the father or mother, as the case may be, of the child alleged to have been abandoned, the trial judge shall so state this fact in his verdict of acquittal. In the event the verdict of the jury or the court shall be for acquittal of such person, and its reason for so doing is that such person is not the father or mother of the child alleged to have been abandoned, such person cannot thereafter again be tried for the offense of abandoning said child, and said verdict shall be a bar to all civil and criminal proceedings attempting to compel such person to support said child.

(d) In prosecutions under this section, when the child is illegitimate, and the accused father is convicted, the accused father shall be required by the court to pay the reasonable medical expenses paid by or incurred on

behalf of the mother due to the birth of the child.

(e) The accused father and the mother of the illegitimate child may enter into a written agreement providing for future support of the child by regular periodic payments to the mother until such child reaches age 18 years, marries, or becomes self-supporting: Provided, however, such agreement shall not be binding on either party until it has been approved by the court having jurisdiction to try pending cause.

(f) Upon the trial of the accused father under this section, it shall be no defense that the accused father has never supported the child.

(g) In prosecutions under this section, when the child is illegitimate, the venue of the offense shall be in the county in which the child and the mother are domiciled at the time of the swearing out of the arrest warrant, but if the child and the mother are domiciled in different counties, venue shall be in the county in which the child is domiciled.

(h) In the trial of any abandonment proceeding in which the question of parentage arises, regardless of any presumptions with respect to parentage, the accused father may request a paternity blood test and agree and arrange to pay for same; and in such cases the court before which the matter may be brought, upon pretrial motion of the defendant, shall order that the alleged parent, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged parent, the known natural parent, and the child. The results of those blood tests and comparisons, including the statistical likelihood of

the alleged parent's parentage, if available, shall be admitted in evidence when offered by a duly qualified, licensed practicing physician, duly qualified immunologist, duly qualified geneticist, or other duly qualified person. Upon receipt of a motion and the entry of an order under the provisions of this subsection, the court shall proceed as follows:

(1) Where the issue of parentage is to be decided by a jury, where the results of those blood tests and comparisons are not shown to be inconsistent with the results of any other blood tests and comparisons, and where the results of those blood tests and comparisons indicate that the alleged parent cannot be the natural parent of the child, the jury shall be instructed that if they believe that the witness presenting the results testified truthfully as to those results and if they believe that the tests and comparisons were conducted properly, then it will be their duty to decide that the alleged parent is not the natural parent.

(2) The court shall require the defendant requesting the blood tests and comparisons pursuant to this subsection to be initially responsible for any of the expenses thereof. Upon the entry of a verdict incorporating a finding of parentage or nonparentage, the court shall tax the expenses for blood tests and comparisons, in addition to any fees for expert witnesses whose testimonies supported the admissibility thereof, as costs.

## STATEMENT OF THE CASE

In 1975 Appellee and his wife, both residents of Georgia, were legally separated. Appellee's wife was given custody of the children, and Appellee was ordered to pay

$150.00 per month for the maintenance and support of his daughter. Appellee made no support payments, but left the State of Georgia and moved to Alabama. (A.16). Thereafter, he remained in continuous violation of his court ordered obligations to his child because he made no payments whatsoever for her support.

On February 13, 1976, while visiting his child in Columbus, Georgia, Appellee was arrested for the offense of child abandonment. (A.17). The grand jury of Muscogee County, Georgia, in a special presentment returned on March 19, 1976, formally charged Appellee with the felony of abandoning his child and leaving the State. (A.3). Appellee pled guilty in the Superior Court on March 26, 1976, and was sentenced to a three-year suspended sentence conditioned upon his paying $200.00 per month for the support and maintenance of his child during her minority. (A.6-8). Upon Appellee's release pursuant to his suspended sentence, he immediately left the State of Georgia again and returned to Alabama. When he again failed to make support payments under the court order, a bench warrant was issued for his arrest. (A.17).

Appellee thereafter moved to Florida and established residence in the Fort Lauderdale area. In 1977, Appellee's estranged wife was murdered, and Appellee attempted to regain custody of his daughter in Florida. He was finally successful in doing so, but only after the juvenile court judge had received assurances from the Florida Governor's office that he would not be extradited to Georgia.

Appellee remained in Florida until January, 1978, when he moved to Augusta, Georgia. Because of incidents of public drunkenness and reports of child abuse and neglect by Appellee while in Florida, the Florida caseworkers

were so concerned about the welfare of Appellee's daughter that they alerted the Georgia Department of Human Resources in Augusta of his arrival. Due to Appellee's drinking problem which was threatening the health and safety of his daughter, the Georgia authorities were compelled to seek temporary custody of Appellee's daughter through an emergency court order. (A.19).

Appellee was then arrested by authorities in Augusta on the outstanding bench warrant from Muscogee County. After a June 9, 1978, hearing in which Appellee's suspended sentence was revoked, he was transported back to Columbus, Georgia, and sentenced to serve three years imprisonment. (A.10). Appellee's daughter was placed with a relative in Columbus, Georgia. (A.19).

On November 21, 1978, Appellee filed a habeas corpus action in the DeKalb County Superior Court, challenging the constitutionality of Ga. Code Ann. § 74-9902, Georgia's child abandonment statute, on the grounds that it violated his right to travel under both the Equal Protection and Privileges and Immunities Clauses of the Constitution. The DeKalb County Superior Court denied relief and ordered that the Appellee be remanded to State custody. (A.11). Appellee's application to the Supreme Court of Georgia for a certificate of probable cause to appeal was also denied. (A.20). Appellee then filed, on March 23, 1979, a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the Columbus Division of the United States District Court for the Middle District of Georgia. (A.21).

The District Court decided the case on the briefs which were submitted by both parties, and entered an order on May 4, 1979, denying relief. (A.28). Appellee filed a notice of appeal (A.31); however, the District Court refused to

grant a certificate of probable cause. Subsequently, the Court of Appeals for the Fifth Circuit granted Appellee a certificate of probable cause to appeal, and oral argument was heard on February 25, 1980.

On July 11, 1980, the Court of Appeals entered an order reversing the District Court's denial of the writ of habeas corpus and declaring Ga. Code Ann. § 74-9902 to be violative of the Equal Protection Clause of the Fourteenth Amendment. (A.32). The Privileges and Immunities question was not reached. The Court of Appeals reasoned that the challenged statute impermissibly interfered with Appellee's fundamental right to travel. Further, the Court ruled that the statute was overly broad, since the State could use the Uniform Reciprocal Enforcement of Support Act as a less drastic alternative to Ga. Code Ann. § 74-9902. It is from this order that this appeal is taken.

## SUMMARY OF ARGUMENT

This case involves a challenge to that portion of Georgia's child abandonment law which provides that guilty parents who leave the State are felons, whereas those who stay within the State are misdemeanants. The Court of Appeals decided that the statute should be subject to strict scrutiny because it infringed Appellee's fundamental right to interstate travel. Finding that Georgia has no sufficiently compelling State interest which permits distinguishing between nonsupporting parents within or without the State, the Court of Appeals held that the challenged statute was violative of the Equal Protection Clause of the Fourteenth Amendment.

It is Appellant's position that the principles underlying the constitutional right to travel were never intended to

protect an accused criminal from suffering the consequences of his misdeeds. Since an accused criminal's rights to full and free travel are attenuated, the rational basis test should be applied to the challenged statute. The State legislature, which is preeminently responsible for defining and punishing crimes, could reasonably have determined that since abandoning parents who leave the State have made it more difficult for the State to bring them to justice, those parents should be subject to more stringent punishment.

Even if the strict scrutiny test is applied, Georgia's child abandonment statute is more than justified by the State's compelling interest in preventing and punishing the crime of child abandonment. There are few duties of a State that rise to the importance of protecting its helpless children and upholding the integrity of its criminal laws.

This statute is narrowly tailored to reach only those parents who commit the crime of child abandonment; it does not penalize the right of "good" parents to travel and migrate to another state—it only discourages crime. Further, the felony provisions are necessary to aid extradition because of the difficulty in obtaining extradition of misdemeanants. Contrary to the ruling of the Court of Appeals, the Uniform Reciprocal Enforcement of Support Act is not a viable alternative to felony extradition because most states have provisions which allow the absent parent to avoid extradition to face criminal charges by agreeing to pay child support.

The Court of Appeals decision has created a situation where a person can wilfully abandon his child in Georgia, and then, for all practical purposes, avoid prosecution for his crime. The Court of Appeals decision should be reversed.

## ARGUMENT

### I. THE STATE HAS A COMPELLING INTEREST IN PREVENTING AND PUNISHING THE ABANDONMENT OF CHILDREN WITHIN ITS BORDERS.

When parents abandon or fail to support their children, they have neglected an almost universally recognized duty which, as explained by Blackstone, is based on natural law, rather than on just the law of one jurisdiction:

> "The duty of parents to provide for the *maintenance* of their children, is a principle of natural law; an obligation . . . laid on them not only by nature herself, but by their own proper act, in bringing them into the world: for they would be in the highest manner injurious to their issue, if they only gave their children life that they might afterwards see them perish. By begetting them, therefore, they have entered into a voluntary obligation to endeavor, as far as in them lies, that the life which they have bestowed shall be supported and preserved. And thus the children will have the perfect *right* of receiving maintenance from the parents." 1 BLACKSTONE, COMMENTARIES, * 447. [Emphasis in original].

It has been the law of Georgia "since the Code of 1863 (§ 1743 now Code § 74-105) that, '[u]ntil majority, it is the duty of the father [1] to provide for the maintenance, protection and education of his child.' " *Murphey v. Murphey*, 215 Ga. 19, 22 (1959).

The provisions regarding abandonment of children under

[1] Georgia's laws relating to intra-familial duties, rights, and obligations underwent a comprehensive modernization in Ga. Laws 1979, pp. 466, *et seq.*, to comply with the standards set forth by this Court in *Orr v. Orr*, 440 U.S. 268 (1979). Today, both parents, absent death, divorce or legal separation, are natural guardians with a co-equal duty to support, and a concomitant right to control, their children. Ga. Laws 1979, pp. 466, *et seq.* (Ga. Code §§ 74-105 and 74-108); Ga. Laws 1976, pp. 688, *et seq.* (Ga. Code § 49-102). Both parents are likewise subject to criminal prosecution for abandonment. Ga. Code § 74-9902; *Hudgins v. The State*, 243 Ga. 798 (1979).

attack in this case are part of Georgia's comprehensive statutory regulation of domestic relations, an area which has long been regarded as a virtually exclusive province of the State. *See, e.g., Popovici v. Agler*, 280 U.S. 379, 383 (1930) (Holmes, J.); *Buechold v. Ortiz*, 401 F.2d 371, 372 (9th Cir. 1968). One of the purposes of Georgia's laws on abandonment is to insure that children are provided for by their natural parents. *Perini v. The State*, 245 Ga. 160, 161 (1980).

Georgia provides that parents who wilfully and voluntarily abandon their children,[2] and leave them in a dependent condition,[3] are guilty of a misdemeanor. On the other hand, parents who wilfully and voluntarily abandon their children, leave them in a dependent condition, and then depart the State, are guilty of a felony. Similarly, when the abandonment occurs after the parents have left the State, they are also guilty of a felony. These two felony offenses carry sentences of imprisonment in the penitentiary for not less than one nor more than three years, but a felony conviction may, within the judge's discretion,[4] be reduced to a misdemeanor.[5] Ga. Code

[2] "Children" as used in Ga. Code § 74-9902, and herein, refers to both legitimate and illegitimate children.

[3] A child need not be totally destitute or on public welfare to be considered in a dependent condition. Evidence that the custodial parent or relative has difficulty in providing necessaries for the child is sufficient. *Fincher v. The State*, 153 Ga. App. 190 (1980). The fact that one parent continues to support the child is no excuse for the one who doesn't. *Carnegie v. State*, 246 Ga. 187 (1980).

[4] Ga. Code § 74-9902(a); *see also*, Ga. Code Ann. § 27-2501, which provides that: "All felonies . . . [with exceptions not pertinent hereto] shall be punished by imprisonment and labor in the penitentiary for the term set forth in the several sections in this Code prescribing the punishment of such offenses; but on the recommendation of the jury trying the case, when such recommendation is approved by the judge presiding on the trial, said crimes shall be punished as misdemeanors. If the judge trying the case sees proper, he may, in fixing the punishment, reduce such felonies to misdemeanors." [Bracketed matter added].

[5] Misdemeanors are generally punished either: (a) by a fine not to

§ 74-9902(a). However, a person who is convicted of child abandonment for the third time is guilty of a felony which cannot be reduced to a misdemeanor. Ga. Code § 74-9902(b).

Clearly, Georgia may place criminal sanctions on parents who forego their duties to their children in order to effectuate both its interest in protecting its children and deterring and punishing anti-social conduct.[6] Nor is there any serious question as to whether a state may assess such penalties on a person who may be a non-resident, if his child is intentionally left in an abandoned, dependent condition within the state.[7]

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exceed $1,000 or by confinement in the county or other jail, county correctional institution or other such places as counties may provide for maintenance of county prisoners for a total term not to exceed twelve months, either a fine or confinement or both; or (b) by confinement under the jurisdiction of the State Board of Corrections in the State penitentiary, in a county correctional institution or such other institutions as the Director of Corrections may direct, for a determinate term of months which shall be more than six months but shall not exceed the total term of twelve months. Ga. Laws 1865-6, p. 233, as amended [Ga. Code Ann. §§ 27-2506(a) and (b)].

[6] State courts have long been nearly unanimous in taking the view that it is within the power of the legislature to declare abandonment or non-support of one's wife or child a criminal offense. *See, e.g., Murphy v. State*, 171 Ark. 620, 286 S.W. 871 (1926); *see generally*, cases collected at Annot., *Power to Make Abandonment, Desertion or Nonsupport of Wife or Family a Criminal Offense*, 48 A.L.R. 1193 (1927).

[7] In addition to Georgia, many other states hold that a parent may be tried for non-support in the state in which his child resides, notwithstanding the parent's residence in another jurisdiction. *See, e.g., People v. Jones*, 257 Cal. App. 2d 235, 64 Cal. Rptr. 622 (1967); *State v. Shaw*, 96 Idaho 897, 539 P.2d 250 (1975); *State v. Klein*, 4 Wash. App. 736, 484 P.2d 455 (1971); *Poole v. State*, 60 Wis. 2d 152, 208 N.W.2d 328 (1973); *State v. Wellman*, 102 Kan. 503, 170 P. 1052 (1918); *Ex parte Heath*, 87 Mont. 370, 287 P. 636 (1930); *State v.*

To the extent that Ga. Code § 74-9902(a) has an extra-territorial effect, it comes within an exception to the territorial principle [8] set forth by Justice Holmes:

> "Acts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power." [9]

Georgia's child abandonment statute has several justifications. Most important is the State's "compelling governmental interest . . . [in] the welfare of the children." *In the Interest of J.C.*, 242 Ga. 737 (1978). Surely it is beyond cavil that

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*Tickle*, 238 N.C. 206, 77 S.E.2d 632, *cert. denied* 346 U.S. 938 (1953); *Osborn v. Harris*, 115 Utah 204, 203 P.2d 917 (1949); *State v. Haworth*, 66 Wyo. 238, 208 P.2d 279 (1949). *But see*, *Hardy v. Betz*, 105 N.H. 169, 195 A.2d 582 (1963) (*contra*). *See generally*, Annot., *Jurisdiction and Venue of Criminal Charge for Child Desertion or Nonsupport as Affected by Nonresidence of Parent or Child*, 44 A.L.R.2d 886 (1955).

[8] The territorial principle takes the position that criminal jurisdiction depends upon the place of perpetration. That is, the state on whose territory the crime was committed has jurisdiction of the offense. Perkins, *The Territorial Principle in Criminal Law*, 22 Hastings L.J. 1155 (1971). During the principle's evolution, confusion arose as to whether the defendant must be present in the jurisdiction in which the offense occurred. *Simpson v. State*, 92 Ga. 41, 43, 17 S.E. 984, 985 (1893). However, this confusion has apparently been put to rest by adoption throughout the states of statutes similar to Ga. Code § 26-301(b), which provides that "a person shall be subject to prosecution in this state for a crime which he commits, while either within or outside the state, by his own conduct or that of another for which he is legally accountable, if (1) the crime is committed either wholly or partly within the state. . . ; (c) a crime is committed partly within this state, if either conduct which is an element of the crime, or the result which is an element, occurs within the state. . . ; (d) a crime which is based on omission to perform a duty imposed by the laws of this state committed within the state, regardless of the location of the accused at the time of the omission." Ga. Laws 1968, pp. 1249, 1261.

[9] *Strassheim v. Daily*, 221 U.S. 280, 285 (1911). Further, in *Skiriotes v. Florida*, 313 U.S. 69 (1941), this Court held that a state had the power to legislate criminal matters occurring without its boundaries

> "the parens patriae must protect the helpless and the innocent. They are the wards of the court, the hope of the State, and the seed corn of the future." *Williams v. Crosby*, 118 Ga. 296, 298 (1903).

As a corollary of this compelling interest is the undeniable burden upon the custodial parent and, perhaps, upon the public treasury, if the child is abandoned. There is no dispute that, if children such as Appellee's are not supported by their parent, they may well have to be dependent upon public welfare for their support.[10]

But beyond the budgetary considerations, and rivaling only the compelling interest in her children, is Georgia's interest in enforcing her criminal laws, the obvious purpose of which is to deter and punish conduct society finds unacceptable. The basic line-drawing process of making

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as to its citizens, providing there was no conflict with federal legislation. The Model Penal Code also goes beyond the common law tradition to permit a state to exercise jurisdiction if "the offense consists of the omission to perform a legal duty imposed by the law of [the forum state] with respect to domicile, residence or a relationship to a person, thing or transaction in the State. . . ." [Bracketed matter supplied] Model Penal Code § 1.03(1)(e)(P.O.D. 1962). George, *Extraterritorial Application of Penal Legislation*, 64 Mich.L. Rev. 609 (1966). *See generally*, Rotenberg, *Extraterritorial Legislative Jurisdiction and the State Criminal Law*, 38 Tex.L.R. 763 (1960).

[10] In January, 1981, there were 232,395 individuals in Georgia, including a total of 167,337 children, who received over $12,600,000 in benefits under the Aid to Families with Dependent Children [AFDC] program enacted pursuant to 42 U.S.C. § 602. Georgia Department of Human Resources Consolidated Statement of Public Assistance, January, 1981. Of the eleven million recipients nationwide in 1974 who were receiving AFDC, 4 out of 5 received public assistance because they had been deprived of the support of a parent who had absented himself from the home. In the 6½ years prior to 1974, families with absent fathers added an overwhelming 4.8 million recipients onto welfare rolls. It was estimated that more than half of these absent parents (approximately 1.3 million) would have paid support if there had been strong child support enforcement. Data extracted from S.Rep. No. 93-1356, 93rd Cong., 2d Sess. 42 (1974), *reprinted in* "Child Support Enforcement Programs," National District Attorneys Association (March 1, 1976).

an act criminal is preeminently the province of the legislature. *Rummel v. Estelle*, 445 U.S. 263, 275 (1980). It is true, of course, that child abandonment is a nonviolent crime, but "the presence or absence of violence does not always affect the strength of society's interest in deterring a particular crime or punishing a particular criminal." *Id.*

There are few areas in which a State has more interest than in the well-being of its children. Appellee does not argue that the State would not be justified in making child abandonment a misdemeanor. But to recognize that Georgia can make child abandonment a misdemeanor rather than a felony "is virtually to concede that the lines to be drawn are indeed 'subjective,' and therefore properly within the province of legislatures, not courts." *Id.* at 275-276.

Just as it may not have seemed "fair" for the defendant in *Rummel* to have received a life sentence for the theft of $120.75 simply because it was his third felony conviction, so it may not seem "fair" for the Appellee to receive a felony conviction for child abandonment simply because he has left the State of Georgia. However, inasmuch as "the length of sentence actually imposed is purely a matter of legislative prerogative," *id.*, at 274, the Georgia General Assembly may rationally have decided that since abandoning parents outside the State have chosen to place themselves beyond the State's jurisdiction and to thus make the continued deprivation of children more likely, the State may impose a more stringent punishment on them.

Further, it is no answer to say that Georgia is the only state which makes a distinction between abandoning parents who leave the State and those who remain behind.

This defense, too, was raised and dismissed in *Rummel v. Estelle, supra,* where Mr. Justice Rehnquist, speaking for the Court, noted that

> "[a]bsent a constitutionally imposed uniformity inimical to traditional notions of federalism, some State will always bear the distinction of treating particular offenders more severely than any other State." *Id.* at 282.

The truth of the matter is that when a parent abandons his child, he has committed a grievous offense not only against his child, but also against the State, and the State is entitled to punish him for that act. And when the parent abandons his child and leaves the State, he has committed a more serious crime, and deserves to suffer a more severe punishment. "In short, the 'seriousness' of an offense . . . in modern society is not a line, but a plane." *Id.*, at 283, n.27. Once the parent who has abandoned his child has placed himself beyond the jurisdiction of the State, he has, in fact, made it difficult, if not impossible, for the State to ever bring him before the bar of justice. Hence, the State is entitled to protect its interests in enforcing its criminal laws by placing a more stringent punishment on abandoning parties who leave the State than those who remain within.

These justifications for Ga. Code § 74-9902(a) are more substantial than the mere budgetary or recordkeeping considerations which were held insufficient to outweigh the constitutional claims of the individuals in *Shapiro v. Thompson,* 394 U.S. 618 (1969); *Dunn v. Blumstein,* 405 U.S. 330 (1972); and *Memorial Hospital v. Maricopa County,* 415 U.S. 250 (1974). Here, as in *Sosna v. Iowa,* 419 U.S. 393, 406 (1975), the crime of child abandonment is not a matter in which the only interested parties are

the State and a person such as Appellee in the role of a potential criminal defendant. Entire families are interested in, and dependent upon, abandonment proceedings, since without the help of the statute, the custodial parent may not be able to obtain any child support payments from the runaway parent. Without the aid of the statute, the child may, at best, have to face the unpleasant prospect of economic deprivation or, at worst, the humiliation of becoming a welfare recipient or even a ward of the State. With "consequences of such moment" riding on the enforcement of child support obligations, Georgia is entitled to use Ga. Code § 74-9902 to accomplish its compelling interests in preventing and punishing the crime of child abandonment. *See, Sosna, supra* at 407.

Here, again, as in *Sosna*, the challenged statute additionally furthers the State's parallel interests in protecting the integrity of its criminal and judicial processes. Georgia may quite reasonably decide that it does not wish to become a "dumping ground" for abandoned children whose parents think they can escape their duties and any punishment simply because they are outside State boundaries. Until such time as the State is convinced that a lesser punishment would accomplish the purposes of its child abandonment law, it is entitled to use a possible felony conviction in furtherance of its compelling interests.

## II. PARENTS WHO ABANDON THEIR CHILDREN IN GEORGIA DO NOT HAVE A RIGHT TO TRAVEL WHICH OUTWEIGHS THE STATE'S COMPELLING INTEREST IN PREVENTING AND PUNISHING THE ABANDONMENT OF CHILDREN.

Appellee challenges Georgia's child abandonment law on the ground that, by declaring that guilty parents who leave the State are felons, whereas those who stay within the State are misdemeanants, the statute violates parents' constitutional rights to interstate travel. Citing cases which seem to broadly assert that the right to travel is a fundamental right always necessitating strict scrutiny under equal protection analysis, Appellee claims that Ga. Code § 74-9902 (a) cannot possibly pass constitutional muster. Motion to Affirm, at 2.

This type of "lock-step" progression which attempts to force Appellant into a "no-win" situation must fail because it betrays a "fundamental misunderstanding of the law" [11] which has developed surrounding the right to travel. Despite the fact that "the concept of that right has not been static," *Maricopa County, supra,* at 280 (Rehnquist, J., dissenting), there is nothing in the decisions of this Court over the past century to suggest that the right to travel encompasses and protects the right of an accused to avoid the consequences of his own misdeeds.

"Although the Articles of Confederation provided that 'the people of each State shall have free ingress and regress to and from any other State,' [12] that right finds no explicit mention in the Constitution." *United States v. Guest,*

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[11] *Dunn v. Blumstein, supra,* at 339.

[12] Art. IV, Articles of Confederation.

383 U.S. 745, 758 (1966). Nevertheless, "freedom to travel throughout the United States has long been recognized as a basic right under the Constitution." *Id.* Despite "recurring differences in emphasis within the Court as to the source [13] of the constitutional right of interstate travel, . . . [a]ll have agreed that the right exists." *Id.* at 759.

Whatever its previous parameters, it now appears that the right scrutinized is not just the right to move from place to place, but rather

> "[t]he right to migrate, 'with intent to settle and abide' or, as the [*Shapiro*] Court put it, 'to migrate, resettle, find a new job, and start a new life.' . . . Even a bona fide residence requirement would burden the right to travel, if travel meant merely movement." *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 255 (1974). [Bracketed matter in original].

To decide whether a law violates the Equal Protection Clause, this Court has said that it will look "in essence, to three things: the character of the classification in question; the individual interests affected by the classification; and the governmental interests asserted in support of the classification." *Dunn v. Blumstein*, 405 U.S. 330, 335

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[13] As explained by Mr. Justice Harlan in his dissent to *Shapiro v. Thompson*, 394 U.S. 618, 666 (1969), opinions of this Court and of individual Justices have suggested several different provisions of the Constitution as a source of the right to travel: the Commerce clause (*Edwards v. California*, 314 U.S. 160 (1941); the *Passenger Cases*, 7 How. 283 (1849)); the Privileges and Immunities Clause of Art. IV, Sec. 2 (*Corfield v. Coryell*, 6 F.Cas. 546) (No. 3230) (1825) (Mr. Justice Washington); the Privileges or Immunities Clause of the Fourteenth Amendment (*Edwards v. California*, 314 U.S. 160, 177, 181 (1941) (Douglas and Jackson, J.J., concurring); *Twining v. New Jersey*, 211 U.S. 78, 97 (1908) (dictum)); and the Due Process Clause of the Fifth Amendment (*Kent v. Dulles*, 357 U.S. 116, 125-127 (1958); *Apthecker v. Secretary of State*, 378 U.S. 500, 505-506 (1964)). *See generally*, Note, *A Strict Scrutiny of the Right to Travel*, 22 U.C.L.A. L.Rev. 1129 (1975).

(1972). Under traditional two-tier analysis, statutes are upheld if they do not arbitrarily discriminate among persons within their jurisdiction, and if there is a rational relationship between the purpose of the legislation and the classification. *McGowan v. Maryland*, 366 U.S. 420, 426 (1961). However, in cases where statutes impermissibly interfere with the exercise of a fundamental right or operate to the peculiar disadvantage of a suspect class, *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 312 (1976), the state classification will be subjected to strict scrutiny and the state must demonstrate compelling and substantial interests to justify the classification. *Dunn v. Blumstein, supra*, at 335; *Shapiro v. Thompson, supra* at 634.

Since Appellee does not claim to be part of a "suspect class," the question before the Court is whether those parents who commit the crime of child abandonment have a fundamental right which demands strict scrutiny in this case. Or, more particularly, the question is whether parents who abandon their children in Georgia, before or after leaving the State, have a constitutional right to migrate, resettle, find a new job and start a new life in another state, that is of such importance as to outweigh the State's compelling interests in protecting its children and the validity of its criminal laws by preventing and punishing the crime of child abandonment. It is the State's position that the parents' rights in this regard are not so fundamental as to outweigh the State's or to trigger the "strict scrutiny" test, and that the "rational basis" test should be used to evaluate the challenged statute.

Whatever the constitutional rights of persons charged with crimes in other contexts may be, their rights to full and free travel are attenuated. As the Georgia Supreme

Court stated in upholding the same statute under consideration here, "[a] person charged in Georgia with commission of a crime who has left Georgia and entered another state cannot be said to have a constitutionally protected right of free travel in interstate commerce that can be asserted to bar prosecution for the Georgia offense." *Garren v. The State*, 245 Ga. 323, 325 (1980).[14]

Notwithstanding any putative right to travel, a person who commits a crime in one state, and simply goes to another state, is subject to summary and mandatory executive interstate extradition proceedings. *Michigan v. Doran*, 439 U.S. 282, 288 (1978). The Extradition Clause,[15] the federal implementing legislation,[16] and, where adopted, the Uniform Criminal Extradition Act,[17] are all binding on state courts and are all intended to enable each state to bring offenders to trial as swiftly as possible in the state where the alleged offense was committed. *Id.* at 287-88.[18] This Court has long held that to be a fugitive from justice, for purposes of extradition, it is not

[14] The Court of Appeals distinguished the *Garren* case by saying that Garren had been charged with child abandonment before he left the State, and that, therefore, he might well have been fleeing with intent to avoid prosecution and payment of child support. *Helms v. Jones*, *supra*, at 213; A.36. However, an examination of the record in *Garren v. The State*, on file in the office of the Clerk of the Georgia Supreme Court, reveals that the Court of Appeals was in error. The indictment against Garren, which was not issued until February 21, 1979, charged him with abandoning his two children on July 1, 1978, and then leaving the State. Thus, *Garren v. The State* and the instant case present identical fact situations.

[15] United States Constitution, Art. IV, Sec. 2.

[16] 18 U.S.C. § 3182.

[17] Georgia has adopted the Uniform Criminal Extradition Act. Ga. Laws 1951, p. 726, as amended; Ga. Code Ann. Ch. 44-4.

[18] Once a governor has granted extradition, a court considering a case on habeas corpus can do no more than decide (a) whether the extradition documents on their face are in order; (b) whether the petitioner has been charged with a crime in a demanding state; (c)

necessary that the person charged with a crime must have left the state with the specific intent of avoiding prosecution, but simply that having committed a crime within a state, he has then left his jurisdiction and is found within the territory of another. *Roberts v. Reilly*, 116 U.S. 80, 97 (1885). The same construction was also given to the predecessor of 18 U.S.C. § 3290, by which federal criminal statutes of limitation are tolled during the time an accused is "fleeing from justice." *Streep v. United States*, 160 U.S. 128, 134 (1895).[19]

In *Scherling v. Superior Court of Santa Clara County*, 149 Cal. Rptr. 597, 585 P.2d 219 (Cal. 1978) [hereinafter "*Scherling*"] the California Supreme Court (*en banc*) upheld a similar statute of limitation tolling provision [20] by noting that:

> "[t]he Legislature could have rationally determined that the likelihood of detection of the crime and identification of the criminal is greater if the accused remains within the jurisdiction, and that because the result—even if not the intent—of his departure from the state is to render discovery of the crime or the criminal more difficult, the statute of limitations

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whether the petitioner is the person named in the request for extradition; and (d) whether the petitioner is a fugitive. *Michigan v. Doran*, *supra*, at 289.

[19] Accord, *Green v. United States*, 188 F.2d 48 (D.C.Cir.) *cert. denied* 341 U.S. 955 (1951); *King v. United States*, 144 F.2d 729 (8th Cir.) *cert. denied* 324 U.S. 1854 (1944); *McGowen v. United States*, 105 F.2d 791 (D.C.Cir.) *cert. denied* 308 U.S. 552 (1939); *but see*, *United States v. Ballesteros-Cordova*, 586 F.2d 1321 (9th Cir. 1978) (*contra*). *See generally*, Annot., *Tolling Federal Criminal Statutes of Limitations by Reason of Flight From Justice Within Meaning of 18 USCS § 3290*, 33 A.L.R. Fed. 716 (1977).

[20] Section 800 of the California Penal Code provides a three-year statute of limitations for burglary; however, Section 802 states that if the defendant is out of the state when or after an offense is committed, no time during which he is absent is to be computed as a part of the limitation period. *Scherling*, *supra*, 585 P.2d at 223.

> should be tolled during his absence." *Scherling, supra,* 585 P.2d at 223.

The defendant in *Scherling* unsuccessfully raised as a defense most of the right to travel cases relied upon by Appellee herein. In upholding the challenged statute, the California Court accurately distinguished those cases, emphasizing that while they

> "instruct us on broad principles, there is clearly a distinction between one who, like defendant, leaves the state after committing a crime, . . . and one who has committed no crime but is deprived of a governmental benefit merely because he exercises his right to travel to another state. In the former circumstance, the State has an interest in assuring that the defendant is available locally not only to enhance the possibility of detection but also to avoid the burdens of extradition proceedings, should he be charged, his whereabouts become known, and he refuses to return voluntarily." *Id.* at 223-224.

So, too, in the instant case, there is clearly a distinction between parents who abandon their children and, for example, the indigents who were denied welfare and medical care in *Shapiro* and *Maricopa County, supra.* Indigency, of course, is no crime; child abandonment is.

The *Scherling* Court also discussed and distinguished *In re King,* 90 Cal. Rptr. 15, 474 P.2d 983 (1970) which had declared violative of the right to travel a statute which increased the crime of child abandonment from a misdemeanor to a felony for persons who *remained* out of the State for thirty days. Although possessing a superficial similarity, *King* is totally inapplicable to the present case, for the California statute did not require, as Ga. Code § 74-9902 does, that a parent must have himself been inside the state and then wilfully abandoned his children before or after he left. The situation deplored

by the *King* Court, that of a father who had never lived in the state, being charged with the abandonment of children brought into the state by their mother, would never come within the purview of the Georgia statute. Thus, the nexus between the abandoning parent and the state is greater in Georgia than it was in California.

Further, as the Court in *King* pointed out, the statute in that case was "*not* one which single[d] out, for greater punishment, nonsupporting fathers who *flee* from California. . . ." *In re King, supra*, 474 P.2d at 990. [Emphasis in original]. In Georgia, on the other hand, although granted that a parent does not have to do so with intent to avoid prosecution, he nevertheless must leave the State. Therefore, the Georgia statute has a much narrower focus than the California law which encompassed fathers who had never been inside the state.

At any rate, insofar as the *King* case might seem to apply to the instant case, Appellant submits that it is simply not good law. The California Supreme Court apparently is also having second thoughts about the *King* rule, for it seemed hard pressed in *Scherling* to avoid having to overrule its decision of some eight years earlier. The *Scherling* Court's rather strained explanation was that "[t]he present case is distinguishable from *King* in that here the defendant is not subject to greater penalty because he left the state; rather, he is faced with a tolled statutory period of limitations." *Scherling, supra*, 585 P.2d at 224. This is clearly erroneous; the simple truth of the matter is that, in *Scherling*, a person who commits the crime of burglary and leaves the state is being treated differently from one who stays in the State. Such is the same situation in Georgia with the crime of child aban-

donment. Perhaps recognizing the fragility of the distinction, the *Scherling* Court emphasized that *King* "did not declare that an accused's right to travel prevails over the state's interest in detecting crime and identifying criminals." *Id.*

Precisely so. An accused's right to travel cannot prevail over the state's interest in preventing and punishing crime.

The only people to whom Ga. Code § 74-9902(a) applies are those who have formed the specific criminal intent [21] to abandon their children. Clearly, there is a difference between them and the people who have been protected in the right to travel cases cited by Appellee and the Court of Appeals.

> "It is important, in applying constitutional principles, to interpret them in light of the fundamental interests of personal liberty they were meant to serve. Respect for these principles is eroded when they leap their proper bounds to interfere with the legitimate interest of society in enforcement of its laws. . . ." *Couch v. United States*, 409 U.S. 322, 336 (1973).

The constitutional principles of the right to travel cases were never meant to serve the interests of parents who commit the crime of child abandonment, and this Court should so hold.

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[21] There are two elements to the crime of child abandonment under Georgia law: (1) desertion, *i.e.*, the willful forsaking and desertion of the duties of parenthood; and (2) dependency, *i.e.*, leaving the child without necessaries. Both elements must be present to complete the offense. *Waites v. The State*, 138 Ga. App. 513, 514 (1976). Thus, there is no question but that specific intent must be found before a defendant may be convicted under Ga. Code § 74-9902.

## III. ASSUMING THE EXISTENCE OF A CONSTITUTIONALLY PROTECTED RIGHT TO TRAVEL, THE CHALLENGED STATUTE DOES NOT PENALIZE THAT RIGHT.

Although many state requirements impinge to some extent on the right to travel and migrate, this Court has never declared such requirement to be *per se* unconstitutional. *Maricopa County, supra* at 256. It is only those classifications which operate to *penalize* people who have exercised their constitutional right to interstate migration which demand strict scrutiny and must be justified by compelling state interest. *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969). Moreover, to be a penalty, an infringement must be "unreasonable," [22] or "impermissible".[23] It is Georgia's position that even if "strict scrutiny" is applied to this case because of the existence of a fundamental right to travel, the challenged statute does not penalize that right.

In assessing the impact the challenged statute has upon an asserted right to migrate, there are, of course, no bright-line tests. It seems apparent that if a state statute contains a durational residency requirement which penalizes a person who has recently exercised a right to interstate travel to the extent that certain "basic necessities of life" such as welfare,[24] and medical care,[25] or a "fundamental political right" such as voting,[26] are totally denied, that statute will be considered a penalty. On the other hand, since higher education is not a "basic necessity of life," it may be provided to residents for a preferential lower

[22] *Shapiro, supra* at 629.
[23] *Murgia, supra* at 312.
[24] *Shapiro, supra.*
[25] *Maricopa County, supra.*
[26] *Dunn v. Blumstein, supra.*

tuition than that charged to non-residents.[27] Furthermore, even durational residency requirements, struck down in *Shapiro*, *Dunn* and *Maricopa County*, are acceptable in certain circumstances, if, for example, they can be met while in student status. *Starns v. Malkerson*, 326 F.Supp. 234 (D.Minn. 1970), *aff'd*, 401 U.S. 985 (1971) cited with approval in *Vlandis v. Kline*, 412 U.S. 441, 452, n. 9 (1973).

Similarly, in *Sosna v. Iowa*, 419 U.S. 393 (1975), a one-year durational residency requirement placed on those who wished to obtain a divorce was not considered so great a penalty on interstate travel and migration as to warrant invalidation. This Court apparently reasoned that since access to the divorce courts had not been "irretrievably foreclosed," but only "delayed," the Appellant's recent interstate travel had not been impermissibly penalized. *Sosna v. Iowa, supra*, at 406.

Here, of course, none of the Appellee's basic necessities of life are being denied, lessened, or even delayed, by the operation of this statute. On the contrary, it is the abandoned children whose interests the State is trying to protect who are the real victims of hardship in this matter: it is they who truly suffer deprivation of the "basic necessities of life."

Indeed, an examination of Ga. Code Ann. § 74-9902 reveals that if the right to migrate to another state is affected at all, it is affected "only incidentally and remotely." *Williams v. Fears*, 179 U.S. 270, 274 (1900). Under the statute, a parent is free to travel and to live at any place of his choosing. The statutory provision only discourages or penalizes migration if the parent has

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[27] *Vlandis v. Kline*, 412 U.S. 441, 452 (1973).

already committed a crime, *i.e.*, if he has already wilfully and voluntarily abandoned his child in the State. If the parent has not abandoned his child when he leaves the State, the statute imposes no penalty on migration, but only discourages the commission of a crime (*i.e.*, the abandonment of a dependent child) once the parent has left the State. Unlike the taxing provision levied on everyone leaving the State in *Crandall v. Nevada*, 6 Wall. 35 (1868), the challenged statute in this case does not reach every person who leaves the State of Georgia; it is narrowly tailored to reach only those persons who have committed, or who will commit, a crime. Unlike the statute which placed criminal penalties on all persons assisting the entry of indigents in *Edwards v. California*, 314 U.S. 160 (1941), Ga. Code § 74-9902 is not geared toward persons in the unfortunate, but blameless, condition of poverty; rather, the statute focuses upon the most blameworthy, the most morally culpable: parents who wilfully desert their helpless children.

Contrary to the assertions of Appellee, Motion to Affirm at 3, this statute does not chill the rights of "good" parents who in all innocence simply want to move to another state to seek employment, education, etc. "Good" parents are no more penalized by the existence of Ga. Code Ann. § 74-9902, than they are by the existence of a summary extradition law, an indefinite statute of limitations, or any one of several other laws which assess heavier penalties on interstate crimes than similar crimes committed entirely intrastate.[28] *See*, Argument II, *supra*.

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[28] *See, e.g.*, 18 U.S.C. § 2312 (transportation of stolen vehicles); 18 U.S.C. § 2421 (transportation of females for immoral purposes); 18 U.S.C. § 1952 (travel in aid of racketeering enterprises).

The truth of the matter is that Ga. Code § 74-9902 is most closely analogous to the "regular" residency requirements (*i.e.*, those which require that a person be a resident at the time of seeking a job, schooling, etc.) which have not been considered penalties by this Court. *McCarthy v. Philadelphia Civil Service Commission*, 424 U.S. 645 (1976). Just as Philadelphia did not have to give the benefit of government employment to non-residents, notwithstanding their right to interstate travel, so Georgia does not have to favor non-residents in the administration of its criminal laws. To place only the possibility of a misdemeanor sentence on child abandonment by a non-resident parent would be, in many instances, to let them escape punishment for their crime (*see*, Argument IV, *infra*), and thus to place non-residents in a favored position over residents. This Georgia does not have to do. *Cf.*, *Califano v. Torres*, 435 U.S. 1 (1978).

## IV. EVEN IF THE CHALLENGED STATUTE IS SEEN AS A PENALTY, IT IS REASONABLY NECESSARY TO FURTHER THE STATE'S COMPELLING INTERESTS IN PREVENTING AND PUNISHING CHILD ABANDONMENT.

In order to serve its compelling interests in protecting the welfare of its children and the integrity of its criminal laws, Georgia, when faced with criminals who leave the State, must, like other states, rely upon extradition, a right considered so important by our forefathers that it was explicitly included in the Constitution.[29] But what the founding fathers did not foresee are the modern-day difficulties faced by a state in attempting to implement

[29] Art. IV, Sec. 2, Cl. 2, United States Constitution; *Michigan v. Doran*, *supra*; *See* text at n. 16, *supra*.

this constitutional prerogative. Due to the discretion inherent in the executive hearings, it is by no means certain that governors of the various states will be amenable to the extradition of members of their community, particularly upon the basis of misdemeanor charges in the domestic area. In the case at bar, even with a felony warrant outstanding, the Florida Governor's office exercised its discretion in 1977 and refused to extradite the Appellee to Georgia. (A.17). It appears reasonable to assume that extradition for misdemeanor offenses would be even more problematical.[30] Moreover, a writ of mandamus will not lie to force a recalcitrant governor of the asylum state to issue a governor's warrant. *Kentucky v. Dennison*, 65 U.S. 66 (1860).

As an additional complication in this day of computers, it is not even possible to use the National Crime Information Center [hereinafter "NCIC"] computer to locate the abandoning parent unless: (1) a federal warrant is outstanding; (2) a felony or serious misdemeanor warrant [31] is outstanding; or (3) the parent is a probation or parole violator meeting the criteria of (1) or (2).[32]

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[30] Technically, of course, a person charged with a misdemeanor is subject to extradition under both Federal and State law, Art. IV, Sec. 2, Cl. 2, United States Constitution; 18 U.S.C. § 3182; Ga. Code Ann. § 44-403; *Graham v. The State*, 231 Ga. 820 (1974). In reality, however, refusal to extradite for misdemeanors is entirely within the governor's discretion. Moses, *Interstate Extradition to Answer Criminal Charges*, 9 S.Tex.L.J. 166 (1967).

[31] Georgia does not have a category of crimes denominated "serious misdemeanors." The only differentiation between misdemeanors is reserved for those of a "high and aggravated nature" Ga. Code Ann. §§ 26-401 and 27-2506.1. Child abandonment has never been included in such a category, and it is doubtful if it could be entered on the NCIC Computer. *Cf.*, *Seaboard Coast Line R.R. Co. v. West*, 155 Ga. App. 391 (1980).

[32] NCIC Operating Manual, Part 7, Section 1, Par. 1.1 (August 1, 1979).

The National Crime Information Center personnel are clearly instructed that:

> "[b]efore entering a record of a wanted person in NCIC, the entering agency must attempt to determine, to the maximum extent possible, that extradition will be authorized if the individual is located in another state. . . .
>
> "In instances where an agency is absolutely certain that the wanted person will not be extradited, the individual's record *must not be entered* in NCIC. Such records are more appropriately maintained in a state or metropolitan system." [Emphasis in original.] NCIC Operating Manual, Part 7, Section 1, Par. 1.1 (August 1, 1979).

Theoretically, it may be possible to use the Parent Locator Services of the 1975 civil Federal Child Support Enforcement Act, Title IV-D of the Social Security Act to search for a parent wanted for criminal abandonment. 42 U.S.C. §§ 651-662. Popularly known simply as "IV-D," the federal act was adopted for the purpose of enforcing the support obligations owed by absent parents to their children, locating parents, establishing paternity, and obtaining child support. *Id.* As a practical matter, however, the primary purpose of IV-D is to enforce *intrastate* support rights assigned to the states by recipients of AFDC. Note, *Interstate Enforcement of Support Obligations Through Long Arm Statutes and URESA*, 18 J.Fam.L. 537, 544-545 (1979-80). Thus, if child abandonment were only a misdemeanor, and if, for example, Florida had a policy of not granting extradition of misdemeanants,[33] parents such as Appellee could never be brought to justice.

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[33] *See*, n. 29, *supra*.

Appellee concedes that "Georgia has a substantial interest in discouraging parents from abandoning their children within her borders, conduct which overburdens their remaining custodian, and can possibly make them public charges." [34] However, both Appellee and the Court of Appeals [35] insist that these interests can be furthered by "less drastic means." [36] In particular, both the Appellee and the lower Court state that the Uniform Reciprocal Enforcement of Support Act [hereinafter "URESA"] [37] provides an adequate remedy for protecting the "fiscal integrity of the State, support of minor children, and extradition of the non-paying parents." [38] Both the Court of Appeals and the Appellee are in error, as an examination of the background and details of URESA procedures will demonstrate.

Prior to the creation and adoption of URESA, the problem of interstate enforcement of duties of support had become acute with the increasing mobility of the American population. A deserting husband was beyond the reach of process in the state where he had abandoned his family, which often had no means to follow him. In addition, welfare departments saddled with the burden of supporting destitute families were often prevented from enforcing the duty of support in the state where the husband could be found, by decisions holding that the duty existed only as to obligees within the state.[39]

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[34] Appellee's Motion to Affirm, p. 2.

[35] *Helms v. Jones*, 621 F.2d 211, 212-13 (5th Cir. 1980); A.34.

[36] *Shelton v. Tucker*, 364 U.S. 479, 488 (1960).

[37] Ga. Code Ann. Ch. 99-9A.

[38] 621 F.2d at 212; *see*, Appellee's Motion to Affirm at p. 3.

[39] Commissioners Prefatory Notes, URESA (1950 Act), 9A U.L.A. 751 (1979). In Georgia, although there had long been laws requiring

Since its first appearance in 1950, URESA has been amended twice, in 1952 and 1958, and revised in 1968. With the exception of New York,[40] all states and United States territories have statutes providing for interstate reciprocity in enforcing support obligations modeled after one of the four revisions of URESA.[41] Georgia's reciprocal support statute [42] today is based primarily upon the 1958 national amendment to the Uniform Act,[43] which states that its purposes are to improve and extend by reciprocal legislation the enforcement of duties of support and to make uniform the law with respect to the enforcement of those duties.[44]

Commentators have characterized URESA as quasi-criminal or quasi-civil in nature [45] because it is organized

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fathers to support their children, *See* Argument I, *supra*, at n. 1, there were for many years no laws requiring fathers to make regular child support payments, except where the mother had been awarded an alimony decree. The only way to have a cause of action against the father was for the mother or another third party to pay for the child's necessaries and then sue the father for their expenditures. *Murphey v. Murphey*, 215 Ga. 19, 22-23 (1959). It was to remedy these conditions that the Georgia General Assembly adopted the uniform acts cited in n.46, *infra*.

[40] New York has adopted the Uniform Support of Dependents Law, N. Y. Domestic Relations Law §§ 30-43 (McKinney 1977), which is substantially similar to URESA and permits reciprocity between the various jurisdictions. *See*, Note, *Counterclaims and Defenses Under the Uniform Reciprocal Enforcement of Support Act*, 15 Ga.L.Rev. 143 (1980).

[41] Note, 15 Ga. L. Rev., *supra*, at 145, n. 11.

[42] Ga. Laws, 1958, pp. 34, *et seq.;* Ga. Code Ann. Ch. 99-9A.

[43] Georgia first adopted the Uniform Support of Dependents Act, Ga. Laws 1951, p. 107, which was repealed by an intermediate version of URESA, Ga. Laws 1956, p. 703. The 1956 Act was, in turn, superseded by Georgia's current version of URESA, Ga. Laws 1958, p. 34; Ga. Code Ann. Ch. 99-9A. All citations hereinafter to Georgia's URESA will be to the Georgia Code Annotated.

[44] Ga. Code Ann. § 99-902a.

[45] *See* W. BROCKELBANK, INTERSTATE ENFORCEMENT

into four related but distinct parts: I. General Provisions;[46] II. Criminal Enforcement;[47] III. Civil Enforcement;[48] and IV. Registration of Foreign Support Orders.[49]

However, URESA was never intended to be an exclusive remedy; the procedures it provides are, by its own terms, in addition to, and not in substitution for, any other remedies, Ga. Code Ann. § 99-904a. The existence of URESA should not and does not exclude the alternative remedy of criminal prosecution for abandonment or nonsupport. *Government of Virgin Islands v. Audain*, 366 F.Supp. 710, 712 (D.C.V.I. 1973).

The most glaring error committed by the Court of Appeals in urging URESA extradition as a substitute for a felony extradition is its oversight of the fact that under the URESA adopted by many states the "*obligor may be relieved of extradition* to [the demanding] State if he submits himself to the jurisdiction of the superior court of [the responding or asylum] State and complies with the court's order of support." [Emphasis and bracketed matter added]. Ga. Code Ann. § 99-906a.

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OF FAMILY SUPPORT, 29 (2d.ed. F. Infausto 1971).

[46] The general provisions contain a statement of purposes, Ga. Code Ann. § 99-902a, *see* text at n. 43, *supra;* and a definition of terminology, Ga. Code Ann. § 99-903a.

[47] The criminal enforcement provisions of URESA only provide a mechanism for the extradition of a person from one state to another to stand trial under the state's own criminal nonsupport statutes. There are not criminal penalties, *per se*, in URESA. Ga. Code Ann. § 99-906a.

[48] Basically, URESA provides for a two-state proceeding which is commenced by the obligee in the initiating state, with the determination there that the respondent owes a duty of support and that the court of another state may obtain jurisdiction of the defendant or his property. Upon certification to the responding state, the court thereof is supposed to assume jurisdiction, set the matter for hearing, and make the appropriate order. Ga. Code §§ 99-909a-923a.

[49] Ga. Code Ann. § 99-937a.

Although this section represents a minority variation from the official text of the 1958 URESA Amendments, approximately nine other states [50] have adopted language substantially similar to Georgia's. *See*, 9A U.L.A. 765-66 (1979). Furthermore, even though the 1968 URESA section relating to interstate extradition was changed to reflect a different procedure, it still provides that

> "(a) Before making the demand upon the Governor of another state for the surrender of a person charged criminally in this State with failing to provide for the support of a person, the Governor of this State may require any prosecuting attorney of this State to satisfy him that at least [60] days prior thereto the obligee initiated proceedings for support under this Act or that any proceeding would be of no avail.
>
> "(b) If, under a substantially similar Act, the Governor of another state makes a demand upon the Governor of this State for the surrender of a person charged criminally in that state with failure to provide for the support of a person, the Governor may require any prosecuting attorney to investigate the demand and to report to him whether proceedings for support have been initiated or would be effective. If it appears to the Governor that a proceeding would be effective but has not been initiated he may delay honoring the demand for a reasonable time to permit the initiation of a proceeding.
>
> "(c) If proceedings have been initiated and the person demanded has prevailed therein the Governor may decline to honor the demand. *If the* obligee prevailed and the *person demanded is subject to a support order, the Governor may decline to honor the demand if*

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[50] Alaska Stat. § 25.25.050; Del. Code Tit. 13 § 611; Haw.Rev.Stat. § 576-12; Mich. Stat. Ann. § 25.225(7); Miss. Code Ann. § 93-11-13; N. J. Stat. Ann. § 2A:4-30.6; P.R. Laws Ann. Tit. 32 § 3312(a); S.C. Code § 20-7-380; V.I. Code Ann. Tit. 16 § 402.

*the person demanded is complying with the support order.*" URESA (1968 Act) 9A U.L.A. 668-69 (1979). [Emphasis supplied.]

Thus, regardless of which version of URESA has been adopted by a given state, almost all states place conditions on interstate extradition or rendition such that the absent parent can either automatically, or at the discretion of the Governor of the asylum state, defeat a demanding state's attempt at URESA extradition.

Furthermore, the "court's order of support" to which the above section refers is that of the court of the responding state, not that of the demanding state. And the duty of support enforced under URESA is not necessarily that imposed by the law of the demanding state; It is that "imposed or imposable under the laws of any state where the *obligor* was present during the period for which support is sought" which is presumed to be the *responding* state "until otherwise shown." Ga. Code Ann. § 99-907a. [Emphasis added.] The implications of this statutory choice of law are such as may, in certain situations, totally preclude recovery of any support payments, *See, Hardy v. Betz,* 105 N.H. 169, 195 A.2d 582 (1963).

However, even assuming an ideal situation, where Appellee's ex-wife had been successful in using the extradition provision of URESA to bring him into a Florida court, where he agreed, or had been ordered, to pay the full $200 per month originally set by the Georgia court, he could still avoid criminal prosecution in Georgia forever by simply remaining out of the State. Thus, Georgia's admittedly substantial interest in seeing that people who commit crimes within her jurisdiction are "brought to book" can easily be thwarted if reliance has to be placed solely on the extradition provisions of URESA.

The opinion of the Kentucky Court of Appeals in *Hamilton v. Hamilton*, 476 S.W.2d 197 (Ky. 1972) is an excellent example of difficulties encountered in seeking to obtain or to enforce a child support decree. The facts are relatively simple: a husband and wife agreed upon a divorce settlement in 1960; the wife retained custody of their daughter and waived her claim to alimony in exchange for the husband's agreement to pay $200.00 per month for child support. Within a short time, the husband had left Kentucky and was living in Florida. Outside the jurisdiction of the Kentucky court, he summarily reduced his payments from $200.00 to $75.00 per month. The wife later sought to have her Kentucky judgment enforced in Florida under the Uniform Support of Dependents Act [51] only to find that Florida, as the responding state, would neither extradite her husband nor force him to pay more than the $75.00 per month he had been paying for some time.

After twelve long years of litigation, Mrs. Hamilton was finally able to obtain some court-ordered support from her husband, but her case is probably unique in that regard. By 1970, Mr. Hamilton had moved to New Jersey and was working for a New York corporation which also did business in Kentucky, and over whom the Kentucky courts had personal jurisdiction. Based upon those unusual circumstances, the Kentucky court ruled that his wages could be garnished to satisfy the support judgment. 476 S.W.2d at 200-201. Had Mr. Hamilton been

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[51] The applicable statutes of both Florida and Kentucky are based upon URESA. The title "Uniform Support of Dependents Act" in Kentucky is apparently a holdover from earlier legislation formerly in effect in that state; all but the name has been supplanted by URESA. Note, *Enforcement of Support Obligations: A Solution and Continuing Problems*, 61 Ky.L.J. 322 (1972).

a typical drifting absentee father, he probably would have "moved on" once the garnishment had been effected, and his wife would have had to begin anew the difficult process of trying to obtain support payments for their child.

Thus, as the experience of the *Hamilton* case indicates, an attempt to enforce a judgment under URESA can be most unsatisfactory.[52] Custodial parents and minor children must have their claim evaluated in a distant forum and, unless they can bear the expenses of traveling there, the hearing takes place without their having an opportunity to testify in their own behalf. In most cases, the custodial parent and child are represented in the responding state by the county prosecutor's office, and their claim often takes a low priority among other local matters to be handled by the prosecutor.[53] Consequently, even under URESA, a custodial parent and minor children are faced with uncertainty, delay and legal expense in ob-

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[52] Such problems are apparently becoming more and more common under URESA. A Wisconsin study on compliance with child support orders found that "after one year only 38 percent of the fathers were in full compliance and 42 percent were in total noncompliance, *i.e.*, they paid nothing. But at the 10th year compliance had dropped to 13 percent and total noncompliance had risen to 79 percent." Conti, *Child Support: His, Her, or Their Responsibilities*, 25 DePaul L.Rev. 707, 718, n.62 (1976). Another writer found that it was not unusual in URESA cases for a father to explain that he had not paid support primarily because he did not approve of the present conduct of his former wife, even though such approval or disapproval is legally irrelevant to the obligation to pay child support. Yee, *What Really Happens in Child Support Cases: An Empirical Study of Establishment and Enforcement of Child Support Orders in the Denver District Court*, 57 Denver L.J. 21 (1979). *See also*, Note, *Interstate Enforcement of Support Obligations Through Long Arm Statutes and URESA*, 18 J.Fam.L. 537 (1979-80).

[53] In Michigan, for example, some 40% of URESA cases filed with county prosecutors offices by nonresident plaintiffs are never pursued (based on the results of questionnaires sent to county prosecutors in the state). Note, 61 Ky.L.J. 322 at 329, n. 34.

taining support.

Thus, contrary to the assertions of Appellee and the Court of Appeals, URESA is not a reliably workable alternative to felony extradition. Not only is it of questionable utility in collecting financial support, it can be a total bar to the criminal prosecution of parents who abandon their children. The State has a right to define and punish anti-social conduct such as child abandonment. *See, Rummel v. Estelle, supra.* To follow the Court of Appeals decision in this case would be to defeat that right, because the right to punish crimes is meaningless without an effective means of bringing criminals to trial.

It is no answer to say, as the Court of Appeals did, that the State's compelling interest argument loses force by an alleged failure of the State actively to enforce its child abandonment statute.[54] In the first place, there is no evidence in the record one way or the other concerning the number or frequency of prosecutions under the challenged statute.[55] Secondly, the State's interests can well be furthered just through the threat of the statute's enforcement. Faced with the potential of a felony conviction, parents may be less inclined to abandon their chil-

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[54] *Helms v. Jones, supra,* 621 F.2d at 213, n.7; A.34.

[55] In response to a question from the Court of Appeals at oral argument, counsel for Appellee herein stated he knew of only three prosecutions, and counsel for Appellant herein said he knew of no others. However, the Court of Appeals was in error to assume from these remarks that there were, *in fact,* few, if any, other prosecutions under the felony portion of Ga. Code § 74-9902. In Georgia, the district attorneys of the various judicial circuits, rather than the State Attorney General, customarily handle criminal matters at the trial level. Since oral argument below, counsel for Appellant herein has endeavored to gather some data regarding the numbers of such prosecutions, but to no avail. Of Georgia's 159 counties, only a few of the larger metro counties have computerized data systems, and even those did not have the information sought.

dren and place themselves beyond the State's jurisdiction. Unfortunate as it may be, there are always some people who need the threat of punishment to regulate their behavior.[56]

In sum, felony extradition is not only "reasonably necessary" *Bullock v. Carter*, 405 U.S. 134 (1972), to accomplish substantial and compelling state interests, it is absolutely crucial; without it, Georgia has, practically speaking, no reliable way to punish the crime of child abandonment by parents who evade the law by leaving the State.

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[56] As one commentator put it: "There are some cases where [extradition provisions] are useful. One is the case of the real rotten egg, the kind of fellow, who, being totally selfish, thinks he can go on siring children with nary a thought about their support and who, when sued, will go on a sit-down strike. It is useless to bring a civil suit against such a man. The benefits received will not pay the freight. So the only way to deal with such a man is through the criminal law." W. BROCKLEBANK, INTERSTATE ENFORCEMENT OF FAMILY SUPPORT, 21 (1960). Apparently, the threat of jail, coupled with other support enforcement efforts, does work. Chambers, *Men Who Know They Are Watched: Some Benefits and Costs of Jailing for Nonpayment of Support*, 75 Mich.L.Rev. 900 (1977).

## CONCLUSION

For the foregoing reasons, the Appellant respectfully urges this Court to reverse the decision of the lower court.

Respectfully submitted,

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I, CAROL ATHA COSGROVE, one of the attorneys for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served opposing counsel in this action with three copies of the foregoing Brief for Appellant, by depositing three copies of the same in the United States Mail, with first class postage prepaid, addressed as follows:

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This ____ day of March, 1981.

APR 14 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-850

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

ELIE JONES, WARDEN, STONE MOUNTAIN CORRECTIONAL INSTITUTION, *Appellant,*

v.

BOBBY H. HELMS, *Appellee*

**On Appeal From The United States Court Of Appeals For The Fifth Circuit**

## BRIEF FOR THE APPELLEE

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IN THE

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v.

BOBBY H. HELMS, *Appellee*

**On Appeal From The United States Court Of Appeals For The Fifth Circuit**

## BRIEF FOR THE APPELLEE

### SUMMARY OF THE ARGUMENT

Georgia Code §74-9902(a) classifies the crime child abandonment according to whether the parent has travelled or migrated from Georgia, making the offense a felony if he has. It does so without regard to whether the parent has left the state to flee or to compound the offense or indeed even whether his travel has any connection at all with the offense.

Penalizing the constitutionally secured right to travel, Code §74-9902(a) is subject to strict scrutiny and bears a heavy burden of justification: its classification must be reasonably necessary to promote a compelling state interest.

It cannot escape strict scrutiny as a statutory classification with an impact narrowly confined to those convicted

or accused under it and to their "rights" to flee from justice. The statute chills the right to travel of every parent who may ever be subject to its enhanced penalty. It attaches a penalty not just to flight but to travel for any reason.

The only real interest offered in justification is that the discriminatory treatment facilitates extradition. However, legitimate this interest might be, it does not make the discrimination necessary. In fact, the interest is well served by other means. In addition, Georgia can serve the interest by simply making all child abandonments felonies or by more carefully refining the felony offense in terms which do not needlessly penalize the right to travel.

## ARGUMENT

### I. The Court of Appeals Examined the Discriminatory Classification of Georgia Code §74-9902(A) Under the Appropriate Test, "Strict Scrutiny."

Ordinarily, a statutory classification or discrimination must simply have a plausible and rational connection with some legitimate state interest in order to pass muster under the Equal Protection Clause, *McGowen* v. *Maryland,* 366 U.S. 420 (1961), *Dandridge* v. *Williams,* 397 U.S. 471 (1970), *Reed* v. *Reed,* 404 U.S. 571 (1971). *See also Vance* v. *Bradley,* 440 U.S. 93 (199). If not wholly irrational or arbitrary, it will not be set aside merely because it "is not made with mathematical nicety or because in practice it results in some inequality," *Lindsey* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911).

This "traditional" inquiry "involves a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one," *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307, 314 (1976), and its recognition that legislatures are better suited to resolve conflicting issues of public policy, see *Dandridge* v. *Williams*, *supra* at 487-88, *San Antonio School District* v. *Rodriguez*, 411 U.S. 1, 40-43 (1973), *Harris* v. *McRae*, ___ U.S. ___, ___ (1980). It also reflects the confidence implicit in our very form of government that in due course the democratic process can rectify unwise legislation and correct and improve imperfect legislation without the necessity of intervention by the courts. *See Vance* v. *Bradley*, *supra* at 97.

It is a different inquiry altogether, however, if the legislation significantly infringes on some right secured by the Constitution,[1] or if it involves certain "suspect" criteria.[2] The implication of fundamental values ordained in the Constitution moves the matter beyond the realm of shifting public policy and more comfortably into the special bailiwick of the courts.

Such legislation is presumptively unconstitutional, *City of Mobile* v. *Bolden*, 446 U.S. 55, 76 (1980) (plurality

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[1] *E.g.*, *Williams* v. *Rhodes*, 393 U.S. 23 (1968) (First Amendment rights), *Bulloch* v. *Carter*, 405 U.S. 134 (1972) (the right not to be unreasonably excluded from the franchise), *Zablocki* v. *Redhail*, 434 U.S. 374 (1978) (fundamental rights of personal privacy).

[2] *E.g.*, *McLaughlin* v. *Florida*, 379 U.S. 84 (1964) (race), *Graham* v. *Richardson*, 403 U.S. 365 (1971) (alienage).

opinion of Stewart, J.), *Harris* v. *McRae*, ___ U.S. ___, ___ (1980), and it is subject to the "strict scrutiny" of the judiciary. It must be justified as "reasonably necessary," *Bulloch* v. *Carter, supra* at 144 (emphasis added), "to promote a *compelling* governmental interest," *Shapiro* v. *Thompson*, 394 U.S. 618, 634 (1969). That is, it must "be not merely convenient, but necessary" and it must "promote not merely a constitutionally permissible state interest, but a state interest of substantial importance," *Oregon* v. *Mitchell*, 400 U.S. 112, 229 at 247, n. 30 (1970) (separate opinion of Brennan, J.).

To determine which inquiry is appropriate and what measure of justification is necessary depends upon "the nature of classification and the individual interests affected," *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 254 (1974), *Dunn* v. *Blumstein*, 405 U.S. 330, 335 (1972).

These matters are clear on the face of Georgia Code §74-9902(a). For purposes of punishing those convicted of child abandonment, the statute creates two classes of parents[3] indistinguishable from each other except that

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[3] One class is actually composed of two sub-classes which are subjected to the same treatment: (a) parents who commit child abandonment and then leave the state and (b) parents who leave the state and then commit the offense. See brief for the Appellant, p. 12 and the opinion below at A. 33. The first sub-class seems roughly focused on sojourners from Georgia (though it is broad enough also to include parents who establish residency elsewhere). The second seems to be directed mainly toward those who have migrated to another state (though it too is broad enough to include sojourners). Although the sub-classifications are insignificant from the right-to-travel ap-

those in one class have travelled from the state.[4] The former, short of a third offense, are subject only to risk of a misdemeanor sentence of 12 months. The latter, "merely by their presence outside the State, are exposed to a risk of felony conviction" (A. 33) and a three-year sentence.

Although occasionally the Appellant treats it as if it were (Brief for Appellant, pp. 17, 22; *see Garren* v. *State*, 245 Ga. 323, 264 S.E.2d 876 [1980]), Code §74-9902(a) is not drafted in terms of flight to avoid prosecution or to commit or compound child abandonment. Compare Ark.Rev.Stat. §41-2504 (1975), Mont.Rev. Codes Ann. §45-5-621 (1979), Okla.Stat.Ann. tit. 21, §852 (West) (1951). Nor has it ever been given such a limiting con-

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proach, the second sub-class more clearly also implicates the privileges and immunities claim (Article IV, Section 2; see A. 22) which the Court of Appeals pretermitted. *See generally Hicklin* v. *Orbeck*, 437 U.S. 518 (1978).

[4] Only a few other states comparably classify child abandonment according to travel or residency outside of their jurisdictions. See Appendix to Brief and Ark.Stat.Ann. §41-2405 (1947), Mont.Rev. Codes Ann. §45-5-621 (1979). Okla.Stat.Ann. tit. 21, §§851-852 (West) (1951), R.I. Gen. Laws §§11-2-1, 11-2-2 (1969 Re-enactment, Supp. 1980), Tex. Penal Code Ann. §25-05 (1974), Utah Code Ann. §76-7-201 (1968). The remaining states either make all abandonments a felony or a misdemeanor or else grade the crime according to elements with a neutral impact on the right to travel. See, e.g., Fla.Stat.Ann. §872-04 (Supp. 1979) (felony if abandonment causes great bodily harm or permanent disability), Neb.Rev.Stat. §28-449 (1975) (duration under 20 days is a misdemeanor, over 30 days is a felony), Wash.Rev. Code Ann. §26-20.030 (Supp. 1980) (child under 16, felony; over 16, gross misdemeanor).

struction, *see People* v. *Jones*, 257 Ca.App.2d 235, 64 Ca.Rptr. 622 (1967), and *Dunham* v. *State*, 169 Ark. 257, 275 S.W. 325 (1925). As the Appellant acknowledged, "a parent does not have to [leave Georgia] with intent to avoid prosecution" in order to be liable as a felon (Brief for Appellant, p. 25). In fact, under the plain terms of the statute, leaving the state need not even have any direct connection to the child abandonment or even be a part of it. Compare R.I. Gen. Laws §11-2-2 (1969 Re-enactment, Supp. 1980). Leaving the state for *any* reason at all, commendable or innocent as well as culpable, triggers the special felony jeopardy.

The classification turns directly upon parents' exercise of the right to travel or migrate to other states of the Union. It explicitly attaches to the exercise of that right a criminal penalty, a special risk of felony treatment if charged or convicted of child abandonment. *See United States* v. *Jackson*, 390 U.S. 570 (1968), *Zablocki* v. *Redhail, supra.* It attaches a penalty far less mistakably than the legislative schemes which this Court disposed of in *Shapiro* v. *Thompson, supra, Memorial Hospital* v. *Maricopa County, supra,* and *Dunn* v. *Blumstein, supra,* all of which involved only civil disabilities generated by durational residency requirements.

It is far too late in the day to maintain seriously that the right to travel on which Code §74-9902(a) turns is not a right firmly secured by the Constitution. *See Crandall* v. *Nevada*, 6 Wall. (73 U.S.) 35 (1868), *Edwards* v. *California*, 314 U.S. 160, 177 (1941) (Jackson, J., concurring), *United States* v. *Guest*, 383 U.S. 745 (1966), *Shapiro*

v. *Thompson, supra, Dunn* v. *Blumstein, supra, Memorial Hospital* v. *Maricopa County, supra.*

Since the right therefore may not be unreasonably or unnecessarily impeded without compelling justification, *Dunn* v. *Blumstein, supra* at 341, Code §74-9902(a) warrants the strict scrutiny of the Court of Appeals (A. 33) and just as comparable statutes have received, *see In re King,* 90 Cal.Rptr. 15, 474 P.2d 983 (1970).

The Appellant objects to applying the strict scrutiny test, however, (1) because those subject to the enhanced penalty of Code §74-9902(a) or its threat do not have, in his view, the same constitutional right to travel as the rest of the citizenry (Brief for Appellant, pp. 10-26) and (2) because, with the affected class thus limited to the culpable, the statute does not really "penalize" the right to travel but merely (and reasonably) restricts "the right of an accused to avoid the consequences of his misdeeds" (*id.*, pp. 19, 27-30). Under his analysis, the affected class is only composed of those "parents who commit the crime of child abandonment" (*id.*, pp. 21, 26; see also p. 29) or who are accused of it (*id.*, pp. 21-22, 26). As the rights of criminals and those accused of crime are commonly circumscribed, Code §74-9902(a) affects the constitutional right to travel "only incidentally and remotely" (*id.*, p. 28).

While it is true that only those parents who leave the state and are later convicted of child abandonment will be the only ones ever to suffer directly the discriminatory penalty, it does not follow that they are the only ones

who fall under its shadow and whose rights to travel are encumbered. No one, including the only parents affected in the Appellant's narrow view, can identify in advance of a charge, trial, and conviction which parents fit into that class of unworthies not constitutionally entitled to travel with impunity. *See Aptheker* v. *Secretary of State,* 378 U.S. 500, 509-12 (1964). The presumption of innocence makes them all indistinguishable. Furthermore, since the statute itself contemplates that charges can arise after a parent has left the state and established residency elsewhere, its impact cannot even be limited to a discrete class of parents who cross the state line while "accused" of child abandonment.

In the second place, lacking any sort of specific intent or purpose associated with the departure element, or indeed any necessary connection between departures and the acts constituting the abandonment, the statute's use of the right to travel is blatently arbitrary on its face. It can reach and brand as the distinguishing element of a felony any parent's most innocent and innocuous travel from the state. By its terms, a parent who strolls from Columbus, Georgia, to Phoenix City, Alabama, and back again that evening may have inadvertently opened himself up to a special felony conviction if he has not been adequately supporting his children or to jeopardy of it if there could be any questions of it. The parent who leaves Georgia to find work or job training (see A. 16-17) so that he might better support his family faces the same risk, as does the pilot for Delta Airlines or the steward on

the Southern Crescent.[5] There is nothing intrinsically culpable about this sort of travel, which Code §74-9902(a) nonetheless makes an element of the offense, which would reliably alert any parent that he is exercising a right that he does not fully have so that, if charged with child abandonment, he might be punished as a felon.[6]

The Court of Appeals took the correct view, *see Zablocki* v. *Redhail, supra* at 387, and the only possible view of the affected class when it defined it in broad terms of

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[5] It is no answer to this that if these parents were doing all that they could for their children they would have nothing to worry about. Not only is every parent presumptively innocent of abandonment until convicted, but those actually on the borderline — but on the right side of it — are entitled not to be encumbered in their right to travel. See *Zablocki* v. *Redhail, supra* at 387.

[6] This arbitrary aspect of the statute highlights a separate equal protection deficiency in it which the Court of Appeals did not address, its violation of "the requirement of some rationality in the nature of the class singled out," *Rinaldi* v. *Yeager*, 384 U.S. 305, 308-09 (1966), for treatment as felons for "intrinsically the same quality of offense," *Skinner* v. *Oklahoma*, 316 U.S. 535, 541 (1942), as misdemeanants who never leave the state or those who flee and hide out within the state. *See also James* v. *Strange*, 407 U.S. 128 (1972). Under Code §74-9902(a), a parent who flees the several hundred miles for the North Georgia mountains to conceal himself in the South Georgia swamps specifically to avoid supporting his children is guilty of less of an offense than his neighbor who spent a day looking for work in Chattanooga, Tennessee. The actual intentions of either are irrelevant but the latter, as the Appellant justifies the statute, is saddled with an implicit irrebuttable presumption that he knowingly and wilfully did something to compound his crime. This sort of rationale is impermissibly arbitrary. *See Carrington* v. *Rash*, 380 U.S. 89 (1965), *Aptheker* v. *Secretary of State, supra* at 510-11, regardless of the nature of the individual interest implicated or the legitimacy of the state's countervailing interest, *Rinaldi* v. *Yeager, supra, James* v. *Strange, supra.*

"risk of a felony conviction" (A. 33). That embraces *any* parent with children in Georgia since *any* parent might some day find himself accused of abandonment and threatened with felony punishment simply because of his travel from the state. It includes any parent regardless of whether he is ever actually deterred by the statute or not, *Memorial Hospital* v. *Maricopa County, supra* at 247-58, *Dunn* v. *Blumstein, supra* at 339-40, *Zablocki* v. *Redhail, supra* at 387. Good or bad, actually innocent or only presumptively so, Code §74-9902(a) chills the right to travel of every parent with children in Georgia by attaching a special risk to its free exercise, *see United States* v. *Jackson, supra.*

If the affected class cannot sensibly be restricted to parents who have abandoned their children or who have been accused of it or who have formed an intent to do so, then it follows that the affected interest also cannot be restrictively treated as merely the interest of criminals or fugitives in avoiding their support obligations or prosecution (Brief for Appellant, pp. 19, 21-22, 26) and the equal protection challenge dismissed as only incidentally affecting the right to travel.[7] Code §74-9902(a) is not, by its

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[7] In this part of his argument, the Appellant points out that the rights of those accused of crime may be circumscribed in many respects which impinge upon the right to travel. He relies chiefly on interstate extradition which, like Code §74-9902(a), does not requiring leaving the state with any specific intent in order to be considered a fugitive. As another creature of the Constitution (Art. IV, Sect. 2, Cl. 2), however, what occurs with respect to extradition has little if any bearing in any discussion of the right to travel and limitation imposed on it from another quarter. Any impingement by one con-

own plain terms particularly concerned with any of the usual indications of fugitivity: the purpose or intent with which a parent leaves the state, with whether the charges arose before or afterward, with whether the crime occured before or afterward. It has utterly no concern with whether he is actually a fugitive or a parent bent on compounding a crime. It treats any parent ensnared for abandonment and eligible for felony prosecution for departing the state as if he had exercised a non-right to flee or compound a crime, *see Mahon* v. *Justice*, 127 U.S. 700 (1887), rather than simply exercising his right to travel, and anyone accused is powerless to try to establish otherwise.[8] Code §74-9902(a) is a "statutory blunderbuss," *Zablocki* v. *Redhail, supra* at 403, 405 (Stevens, J., concurring), pointed straight at the right to travel.

None of the precedents from this Court support the Appellant's tortured, narrow view of "the nature of the classification and the individual interests affected," *Memorial Hospital* v. *Maricopa County, supra* at 254. None afford a basis for anything but strict scrutiny.

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stitutional procedure on another constitutional right is not necessarily something that a state statute, in another context altogether, can share. As for the Appellant's reliance on differences in treatment occasioned by statutes tolling periods of limitations during absence from the state, that sort of procedural accomodation to the right to travel, designed to secure *equal* treatment for those who remain in the state, is scarcely comparable to the criminal penalty affixed by Code §74-9902(a). *Compare Zablocki* v. *Redhail, supra, with Califano* v. *Jobst*, 434 U.S. 47 (1977).

[8] See n. 4, *supra*.

**II. Particularly in View of the "Less Drastic Means" Available to Secure the State's Only Real Interest, the Statutory Classification Based on the Exercise of the Right to Travel Cannot be Justified as Necessary.**

The Appellant has advanced two basic interests to justify the discrimination in penalty based upon interstate travel which Code §74-9902(a) sanctions, the state's "interests in protecting the welfare of its children and the integrity of its criminal laws" (Brief for Appellant, p. 30).

Though it has obvious appeal as far as the Appellant's position it concerned, "Georgia's interest in enforcing her criminal laws" (*id.*, p. 15) is not an interest which is properly distinct from the interest the particular criminal law itself was designed to secure. If if were, it would be a useful bootstrap, but a discrimination is no less invidious or more justifiable simply because it is lodged in a penal rather than a civil code. The discrimination or the burden on a constitutional right should be no less free of scrutiny simply because it wears the solemn robes of the criminal law.

Indeed, this Court has never treated the fact that a law is penal as adding any special virtue to it just because of the general public interest in the enforcement of the criminal law. Such a statute was involved in *Zablocki* v. *Redhail, supra, Aptheker* v. *Secretary of State, supra, Loving* v. *Virginia,* 388 U.S. (1967), and *McLaughlin* v. *Florida, supra,* to name only a few, but no state interest in the enforcement of the criminal law as an end in itself deflected this Court's scrutiny. See also *United States* v. *Jackson, supra.*

The other general state interest asserted, "protecting its children and deterring and punishing anti-social conduct" (Brief for Appellant, p. 13) is unquestionably a "legitimate and substantial" one, *Zablocki* v. *Redhail, supra* at 388. However, while it is clearly the *general* objective of Code §74-9902, it is not the *precise* interest to which the discrimination in subsection (a) is directed and against which it should be weighed. The more precise interest — and the same interest which the general invocation of the integrity of the criminal law basically boils down to in the Appellant's argument — is to facilitate extradition. (See Brief for Appellant, pp. 30-41.)

Whether this precise interest is a compelling one is not a question to linger long over,[9] for it is only part of the inquiry. The rest of it is whether the statutory classification or discrimination is necessary to promote the interest, *Dunn* v. *Blumstein, supra,* for

> even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental liberties when the end can be more narrowly achieved. The breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose. *Shelton* v. *Tucker,* 364 U.S. 479, 488 (1960) (footnotes omitted).

Accord: *Dunn* v. *Blumstein, supra, Kusper* v. *Pontikes,* 414 U.S. 51 (1973), *Aptheker* v. *Secretary of State, supra.*

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[9] However, the availability of other workable procedures aimed at the same goal, discussed *infra* and at A. 34, certainly suggests that it is not.

Where fundamental rights are implicated, legislation must be drawn with precision, *NAACP* v. *Button*, 371 U.S. 415 (1963), and carefully tailored to serve its objective, *Shapiro* v. *Thompson, supra*. Code §74-9902(a) is not narrowly or precisely drawn. It has an impact far beyond any concerned just with problems of extradition. It penalizes people who have done absolutely nothing to jeopardize Georgia's interests in returning fugitives to her courts.

Apart from the statute's overbreadth, there are two problems with establishing any necessity for indiscrimate penalty which Code §74-9902(a) attaches to the right to travel in the name of facilitating extradition.

The first, emphasized by the Court of Appeals (A. 34), is the actual existence of other procedures under the Extradition Clause and the Uniform Reciprocal Enforcement of Support Act which should reasonably accomplish the objective claimed for the discrimination in Code §74-9902(a) without specially penalizing the right to travel. *See Zablocki* v. *Redhail, supra* at 389-90. Like everything else devised by man, these procedures no doubt occasionally work imperfectly (see Brief for Appellant, pp. 21, 23, 26-37), but that hardly justifies an extreme interference with the right to travel. Moreover, there is no reason to suppose that the authorities in other states would be any more cooperative in returning their fellow citizens to the discriminatory prosecution authorized by Code §74-9902(a).

The second problem is that a number of "less drastic means" which do not involve the discrimination of Code

§74-9902(a) are easily open to Georgia if she really considers that interstate travel affects her interests in extraditing parents who have abandoned children in Georgia. For one very simple thing, she could make all child abandonment felonies and treat every parent equally without regard to whether he has exercised the right to travel.[10] She might make her intrusion onto the right to travel truly incidental by identifying actual aggravating elements (such as a purpose or intent to compound the crime) in a way neutral to the constitutional right and applicable if the parent never leaves the state.[11] *Cf.*, *Aptheker* v. *Secretary of State, supra.* Possibly, she might refine her intrusion onto the right to travel by compling a specific intent or purpose to its exercise.[12]

In any event, the statutory discrimination itself is plainly not necessary to any interest Georgia has offered and it is not narrowly tailored to any such interest. It is not necessary to any legitimate state interest to treat every parent who leaves the state as a potential felon bent upon escaping justice and compounding crime and every parent who does not as a misdemeanant. *See Aptheker* v. *Secretary of State, supra* at 509-11.

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[10] A number of states take this approach. See Appendix, *infra.*

[11] See n. 4, *supra.*

[12] But *cf.*, *Crandall* v. *Nevada, supra.*

## CONCLUSION

This Court should affirm the judgment of the Court of Appeals and hold Georgia Code §74-9902(a) repugnant to the Equal Protection Clause of the 14th Amendment.

JAMES C. BONNER, JR.
Counsel for the Appellee

# APPENDIX

## APPENDIX TO BRIEF

## CHILD ABANDONMENT STATUTES

*Ala. Code* tit. 13A, §13A-13-5(1978) (Class A Misdemeanor)

*Alaska Stat.* §11.51.120 (Supp. 1980) (Class A Misdemeanor)

*Ariz. Rev. State.* §12-2458 (Supp. 1980) (Class 6 Felony)

*Ark. Stat. Ann.* §41-2405 (1947) (Class A Misdemeanor [sentence not exceeding one year] *except* if parent leaves or remains outside state with purpose to avoid duty of support it is a Class D Felony [sentence not exceeding five years imprisonment])

*Cal. Penal Code* §270 (West) (1981) (Misdemeanor)

*Colo. Rev. Stat.* art. 6, §14-6-101 (Supp. 1978) (Class 5 Felony)

*Conn. Gen. Stat. Ann.* §53-304 (Supp. 1980) (imprisoned not more than one year)

*Del. Code* tit. 13, §502 (revised 1974) (fine no more than $500.00 or hard labor for no more than one year, or both)

*D.C. Code Encycl.* §§22-901-22-903 (West) (1967 Supp. 1978-79) (Misdemeanor)

*Fla. Stat. Ann.* §827.04 (Supp. 1979) (misdemeanor *except* if causes great bodily harm or permanent disability) (Felony of 3rd degree)

*Ga. Code* §74-9902 (1933, 1978) (misdemeanor *except* after leaving state-felony)

*Haw. Rev. Stat.* §709-903 (1976 Replacement) (Misdemeanor)

*Idaho Code* §18-401 (1972 Supp. 1980) (Felony)

*Ill. Ann. Stat.* ch.40, §1101 (Smith-Hurd) (1979) (Class A Misdemeanor)

*Ind. Code Ann.* §§35-46-1-4, 35-46-1-5 (Burns) (1979 Replacement)

*Iowa Code Ann.* §726.5 (West) (1978) (Class D Felony)

*Kan. Stat.* §21-3605 (Supp. 1979) (Class E Felony)

*Ky. Rev. Stat. Ann.* §530-040 (Baldwin) (1975) (Class D Felony)

*La. Stat. Ann.* §14:74 (West) (Supp. 1980) (fine not more than $500.00 or imprisoned not more than six months or both)

*Me. Rev. Stat.* tit. 19, §481 (1964) (fine not more than $300.00 or imprisoned not more than 11 months or both *except* if "high and aggravated" fine not more than $500.00 or imprisoned not more than two years or both)

*Md. Code Ann.* art. 27, §88(b) (1957) (Misdemeanor)

*Mass. Gen. Laws Ann.* ch. 273, §1 (West) (Supp. 1980) (fine not more than $500.00 or imprisoned not more than two years or both)

*Mich. Comp. Laws Ann.* §750.161 (1948) (Felony)

*Minn. Stat. Ann.* §609.375 (West) (Supp. 1980) (nonsupport less than 90 days-imprisonment not more than 90 days or fine not more than $300.00; over 90 days-felony)

*Mo. Ann. Stat.* ch. 559, §§330, 350 (Vernon) (1949) (Misdemeanor)

*Mont. Rev. Codes Ann.* §45-5-621 (1979) (Misdemeanor *except* if aggravated [left state to avoid duty of support] felony)

*Neb. Rev. Stat.* §28-449 (1975) (Misdemeanor *except* if over 30 days felony)

*Nev. Rev. Stat.* §201.020 (1979) (less than six months-misdemeanor, six months — one year-Gross misdemeanor, over one year-fine of no more than $500.00 imprisonment or both)

*N.H. Rev. Stat. Ann.* §639:4 (1977) (Misdemeanor)

*N.J. Stat. Ann.* §2A:100-1 (West) (1969) (Misdemeanor)

*N.M. Stat. Ann.* §30-6-1 (1978) (Misdemeanor *except* if results in great bodily harm 2nd degree Felony)

*N.Y. Penal Law* §260.05 (McKinney) (1980) (Class A Misdemeanor)

*N.C. Gen. Stat.* §14-322 (1969) (Misdemeanor)

*N.D. Cent. Code* §14.07-15 (1977) (Class C Felony)

*Ohio Rev. Code Ann.* §2919.21 (Baldwin) (1974) (1st Degree Misdemeanor)

*Okla. Stat. Ann.* tit. 21, §§851, 852 (West) (1951) (§851-desertion is a felony; §852-omission to provide for child is a misdemeanor *except* if parent leaves state to avoid providing support is a felony).

*Or. Rev. Stat.* §163.555 (1980) (Class C Felony)

18 *Pa. Cons. Stat. Ann.* §18-4321(a) (Purdon) (1973) (Misdemeanor)

*P.R. Laws Ann.* tit. 33, §4241 (1964) (Misdemeanor)

*R.I. Gen. Laws* §§11-2-1, 11-2-2 (1969 Reenactment, Supp. 1980) (§11-2-1-nonsupport is a misdemeanor; 11-2-2-desertion by leaving the state is a felony)

*S.C. Code* §20-7-40 (Supp. 1980) (Misdemeanor)

*S.D. Compiled Laws Assn.* §25-7-16 (Supp. 1980) (1st violation is a misdemeanor; subsequent violations are felonies *note* changed in 1977 to eliminate different penalties for violations by leaving state)

*Tenn. Code Ann.* §39-202 (1975 Replacement) (Misdemeanor)

*Tex. Penal Code Ann.* §25.05 (1974) (25.05(h)-class A Misdemeanor; (i)(2)-3rd degree felony if commits offense while residing in another state)

*Utah Code Ann.* §76-7-201 (1978) (76-7-201(2) is a misdemeanor; 76-7-201(3)(b) committed while residing in another state is a felony)

*Vt. Stat. Ann.* tit. 15, §15-202 (Supp. 1980) (imprisoned not more than two years and/or fine up to $300.00)

*V.I. Code Ann.* tit. 16 §371 (Supp. 1979) (Misdemeanor)

*Va. Code* §20-61 (Supp. 1980) (Misdemeanor)

*Wash. Rev. Code Ann.* §26.20.030 (Supp. 1980) (Over 16 years of age-Gross misdemeanor; under 16 years of age-felony)

*W.Va. Code* §48-8-1 (1980) (Misdemeanor)

*Wis. Stat. Ann.* §52.005 (Supp. 1980-1981) (Misdemeanor)

*Wyo. Stat.* §14-3-103 (1977) (Misdemeanor)

NO. 80-850

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

ELIE JONES, Warden, Stone Mountain Correctional Institution,

*Appellant,*

v.

BOBBY H. HELMS,

*Appellee.*

**Appeal From The United States Court Of Appeals For The Fifth Circuit**

## APPELLANT'S REPLY BRIEF

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NO. 80-850

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# Supreme Court of the United States

October Term, 1980

ELIE JONES, Warden, Stone Mountain Correctional Institution,

*Appellant,*

v.

BOBBY H. HELMS,

*Appellee.*

**Appeal From The United States Court Of Appeals For The Fifth Circuit**

## APPELLANT'S REPLY BRIEF

This brief is presented for the purpose of addressing certain points in Appellee's brief and insuring that the framework within which this case is presented to the Court is as objective as possible.

### I. THE CHALLENGED STATUTE IS NOT OVERLY BROAD.

#### A. The Statute Will Not Necessarily Affect Parents Who Briefly Sojourn Across State Lines.

In his brief, Appellee complains that Ga. Code § 74-9902(a) is overly broad because

"[i]t can reach and brand as the distinguishing elc-

> ment of a felony a parent's most innocent and innocuous travel from the state. By its terms, a parent who strolls from Columbus, Georgia, to Phoenix City, Alabama, and back again that evening may have inadvertently opened himself up to a special felony conviction if he has not been adequately supporting his children or to special jeopardy of it if there could be any suggestions of it." Brief for Appellee, p. 8.[1]

This statement is most misleading. In the first place, the Georgia Supreme Court has never interpreted the statute to apply to brief sojourners from the State.[2] Thus, if the Georgia Supreme Court were faced with a case of a parent who had briefly strolled across state lines, or one who, like the Delta Airlines pilot [Brief for Appellee, p. 8], had left the State briefly on work, but returned, there is no reason to assume it would rule that such parents were encompassed within the intent of Ga. Code § 74-9902(a).

Indeed, there is no reason to assume that the Georgia Supreme Court would do other than this Court did in *Mortensen v. United States*, 322 U.S. 369 (1944) when faced with a challenge to a conviction based on an extremely literal interpretation of the Mann Act. In *Mortensen*, the lower courts had upheld a conviction of a couple who took two prostitutes on a brief vacation from Nebraska to Utah and back again. Strictly speaking, the couple, who ran the house of prostitution, knew that after the return trip, the girls would again be engaged in immoral activities. However, in reversing the convictions,

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[1] Since Appellant has not yet received a copy of Appellee's brief in printed form, all page references herein will be to the typed version.

[2] In the only case in which the Georgia Supreme Court considered the felony/misdemeanor distinction in Ga. Code § 74-9902(a), the defendant had been out of Georgia for over 5 months before he was indicted for abandoning his children and leaving the State. *See, Garren v. The State*, 245 Ga. 323 (1980); Brief for Appellant, p. 22, n.14.

this Court noted that

> "[t]o accomplish its purpose the statute enumerates the prohibited acts in broad language capable of application beyond that intended by the legislative framers. . . . [W]e perceive no statutory purpose or language which prohibits petitioners under these circumstances from using interstate transportation for a vacation or for any other innocent purpose." *Mortensen v. United States, supra,* at 377.

Without intimating an opinion as to whether the Georgia Supreme Court should, or would, so interpret Ga. Code § 74-9902(a), Appellant merely points out that since the statute *could* be so narrowed by the State's highest appellate court, it is misleading and premature for Appellee to suggest that parents on brief sojourns out of state would necessarily be considered felons under the statute.

Therefore, this Court should decline to pass on a constitutional challenge to a statute that is "susceptible of a construction by the state judiciary 'which might avoid in whole or in part the necessity for federal constitutional adjudication, or at least materially change the nature of the problem.' " *Bellotti v. Baird,* 428 U.S. 132, 147 (1976) (*Bellotti* I), quoting *Harrison v. NAACP,* 360 U.S. 167, 177 (1959).

More importantly, however, there is absolutely no evidence in the record that Appellee himself was on a brief, out-of-state sojourn. On the contrary, the record indicates that Appellee left Georgia in the summer of 1975 and did not return until February, 1976, and then only for a visit to his child. [A.16-17] This is an absence for approximately six or seven months, hardly a brief sojourn. Then, after being arrested and pleading guilty to child abandonment, the Appellee again left Georgia in March

or April of 1976 and remained absent for several more months. [A.17-18] Therefore, contrary to the suggestion of Appellee, this Court is not presented with the situation where a parent who briefly sojourns outside the State is wrongfully convicted of a felony offense. Thus, Appellee lacks the personal stake in the controversy needed to confer standing to advance the overbreadth argument in this regard. *H.L. v. Matheson*, ____ U.S. ____, 49 L.W. 4255, 4257 (March 23, 1981).

Nor is this a case where a facial attack should be permitted and sustained on the ground that an average person reading the statute might be discouraged from undertaking innocent interstate travel. The possibility of such discouragement, although conceivable, is so slight that it ought to be considered *de minimis*.

### B. The Validity Of The Second Prong Of The Statute Is Not Before The Court.

For the first time, Appellee asserts that the challenged statute is overly broad because

> "since the statute itself contemplates that charges can arise after a parent has left the state and established residency elsewhere, its impact cannot even be limited to a discrete class of parents who cross the state line while 'accused' of child abandonment." Brief for Appellee, at p. 8.

Although Appellant has explained the existence of the second prong of the statute, it has never been thought to be a matter of controversy before the Court. *See*, Brief for Appellant, pp. 12, 29. By his reference to the part of the statute which provides that a person who abandons his child after leaving the State, Appellee apparently is attempting to "maintain that the statute is overbroad and purports to reach protected, as well as unprotected

conduct, and must therefore be struck down on its face and held to be incapable of any constitutional application." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973). Appellant does not believe that the overbreadth doctrine may appropriately be invoked in this manner here.

> "Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court. A closely related principle is that constitutional rights are personal and may not be asserted vicariously. These principles rest on more than the fussiness of judges. They reflect the conviction that under our constitutional system courts are not roving commissions assigned to pass judgment on the Nation's laws." *Broadrick v. Oklahoma, supra*, at 610-611 [citations omitted].

Of course, Appellant understands that this Court has made a limited exception to this standing rule in certain cases arising under the First Amendment. *See, e.g., Coates v. Cincinnati*, 402 U.S. 611 (1971). However, no claim based on the First Amendment has been, or could be, raised by Appellee. Therefore, "Appellee's standing to contest the validity of the statute as applied to him must be considered on the basis of the facts as stipulated" before the lower court. *Zablocki v. Redhail*, 434 U.S. 374, 409 (1978) (Rehnquist, J., dissenting).

Appellee has stipulated that he pleaded guilty to the felony of first abandoning his child and then leaving the State. [A.17]. Therefore, he has no standing to challenge the second prong of the statute which only applies when a person leaves the State first and does not abandon his child until later.

### C. The Challenged Statute Does Not Encompass Parents Who Are Unable To Pay.

The Court of Appeals has indicated that

> "Under [Ga. Code § 74-9902(a)] a person leaving the State fully intending to support his or her children, *but unable to do so,* commits a felony." [A.34-35] [Bracketed matter and emphasis supplied.]

This is clearly erroneous. In order to be a crime under Georgia law, the abandonment of a child by the father or mother must be "wilful and voluntary." Ga. Code § 74-9902(a); *Waites v. State,* 138 Ga. App. 513, 514 (1976); Brief for Appellant, p. 26, n.21. It is a defense to such a charge to say that a person was not wilfully *refusing* to fulfill his support obligations, but simply that, due to bad fortune, he was *unable* to make any payments. *Elam v. The State,* 138 Ga. App. 432 (1976); *Moody v. The State,* 141 Ga. App. 294 (1977). *See also, Padova v. The State,* 151 Ga. App. 167 (1979). This rule is consistent with Georgia's approach to support obligations in regular civil custody disputes. *See, e.g., Brown v. Brown,* 237 Ga. 122 (1976).

Appellee has never alleged, and there is no evidence in the record to indicate, that he was, for any reason, unable to make child support payments. Thus, this Court should correct the Court of Appeals which erroneously indicated that Ga. Code § 74-9902(a) is overly broad in that it reaches the truly misfortunate parents who, through no fault of their own, are honestly unable to properly support their children.

### D. The Statute Is Not Defective Because Of A Lack Of Specific Intent.

Both the Appellee and the Court of Appeals found the

absence of specific intent in Ga. Code § 74-9902(a) to be indicative of its overbreadth. Brief for Appellee at p. 8; A.34-35. Appellant acknowledges that the challenged statute does not require a specific intent to avoid either prosecution or child support obligations, but submits that no such specific intent is required.

Although "this Court has never articulated a general constitutional doctrine of *mens rea*," *Powell v. Texas*, 392 U.S. 514, 535 (1968), it has noted that "[t]he element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness." *United States v. United States Gypsum Co.*, 438 U.S. 422, 445 (1978).

> "[I]t is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result." W. LaFave & Scott, Criminal Law 196 (1972).

"Generally this limited distinction between knowledge and purpose has not been considered important since 'there is a good reason for imposing liability whether the defendant desired or merely knew of the practical certainty of the results.' LaFave & Scott, *supra*, at 197. In either circumstance, the defendants are consciously behaving in a way the law prohibits, and such conduct is a fitting object of criminal punishment." *United States v. United States Gypsum Co.*, *supra*, at 445 [citations omitted].

In order to be guilty of a felony under Ga. Code § 74-

9902(a), one must have the general [3] criminal intent to wilfully and voluntarily abandon one's child and leave it in a dependent condition. The fact that one does not have to have any "evil design" when he crosses the State line does not make the statute defective.[4] A lack of specific purpose in the challenged statute is in keeping with conclusions drawn by certain commentators from the historical developments of the mental requisites of crime:

> "The conception of *mens rea* has varied with the changing underlying conceptions and objectives of criminal justice. At the beginning when the objective of criminal administration was to restrict and supplant the blood feud, the mental factor was of importance insofar as it determined the provocative nature of the offense. . . .
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> * * *
>
> "Our modern objective tends more and more in the direction, not of awarding adequate punishment for moral wrongdoing, but of protecting social and public interests. To the extent that this objective prevails, the mental element requisite for criminality, if not altogether dispensed with, is coming to mean, not so much a mind bent on evil-doing as an intent to do that which unduly endangers social or public interests." Sayre, Mens Rea, 45 Harv.L.Rev. 974, 1016-1017 (1932) (footnotes omitted).

This is not to say, of course, that Ga. Code § 74-9902 is a strict liability crime which dispenses altogether with

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[3] Appellant wishes to correct the assertion on p. 26 of its main brief, both in the text and at n.21, that a specific criminal intent must be found before one may be convicted under Ga. Code § 74-9902.

[4] An example of another statute which does not require intent of any kind for one of its elements is statutory rape. *See*, Ga. Code § 26-2018. In Georgia, lack of specific purpose or even general knowledge of the victim's age is irrelevant. *Drake v. The State*, 239 Ga. 232, 233 (1977).

criminal intent, *see, Morissette v. United States*, 342 U.S. 246, 262, n.20 (1952), but rather that it is a hybrid statute which requires intent for some, but not all, of its elements. Differing rules of criminal responsibility for differing circumstances

> "have historically provided the tools for a constantly shifting adjustment of the tension between the evolving aims of the criminal law and changing religious, moral, philosophical, and medical views of the nature of man. This process of adjustment has always been thought to be the province of the States." *Powell v. Texas, supra*, at 536.

Just as this Court in *Michael M. v. Superior Court of Sonoma County*, ____ U.S. ____, 49 L.W. 4273 (March 23, 1981), has recognized the important and substantial state interest in preventing teenage pregnancies which underlies statutory rape laws, so too should it recognize the compelling interests in preventing child abandonment by people beyond the State's jurisdiction, which validates Ga. Code § 74-9902(a), notwithstanding its lack of a specific intent attached to the crossing of state lines.

## II. THE CHALLENGED STATUTE IS NOT UNIQUE.

Appellee notes that "[o]nly a few other states comparably classify child abandonment according to travel or residency outside of their jurisdictions." Brief for Appellee at p.5, n.4. And in its discussions of other state statutes, the Court of Appeals also seems to imply that Georgia's statute is uniquely overbroad. [A.35, n.10] Appellant believes that such criticism is misplaced.

Although no other states have child abandonment statutes exactly the same as Georgia's (see Brief for Appellant at 16-17), several states do share the same approach to the problem of parents who abandon their children and

absent themselves from the State.[5] For example, in Texas, criminal nonsupport is a Class A misdemeanor in ordinary circumstances, but a felony in the third degree if the actor "commits the offense while residing in another state." Tex. Penal Code Ann. § 25.05 (1974). The practice commentary on this criminal nonsupport section indicates that "the felony grade for the offense of nonsupport by a spouse who is out of state facilitates extradition and continues prior law." *Id.* Utah's criminal nonsupport statute is identical to that of Texas. *See,* Utah Code Ann. § 76-7-201 (1968).

In Tennessee, any person who wilfully leaves the state, after abandoning his child with intent to leave it destitute, is guilty of a felony, Tenn. Code Ann. § 39-217 (1975) whereas a person who so abandons his child without leaving the state is guilty of a misdemeanor. Tenn. Code Ann. § 39-202 (1975). Further, it is a felony for a person under a court order of support to leave the state without complying with the order or, while absent from the state, to fail to comply with the order. Tenn. Code Ann. § 39-219 (1975). No similar crime appears to be levied on those who fail to comply with court orders while within the State.

Thus, Georgia is not alone in seeking to vindicate her interests in protecting her children and enforcing her criminal laws by enacting a statute which provides that a person who commits the crime of child abandonment and leaves the State is guilty of a felony, whereas a per-

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[5] Several other states make it a felony for parents to leave the state with the intent to avoid their duty of support, whereas it is only a misdemeanor for those who remain in the state. *See, e.g.,* Ark.Stat. Ann. § 41-2407 (1947); Mo.Stat.Ann. § 568.04 (Vernon, 1949) (Criminal nonsupport); Okla.Stat.Ann.Ch. 31 § 852 (West, 1951).

son who commits the crime of child abandonment without leaving the State is only guilty of a misdemeanor.

Nor is the challenged statute the only provision in Georgia law to make such a felony/misdemeanor distinction. Thus, Georgia stands in contrast to Arkansas, where the official statutory commentators noted that "[t]he difficulty in apprehending a defendant is not a relevant grading criterion in the case of any other offense, and nonsupport should not be an exception." *See*, Ark. Rev.Stat.Ann. § 41-2405 (1975) as discussed by the Court of Appeals, A.35, n.10. Under Ga. Code § 74-9903, it is a felony for a husband to abandon his pregnant wife and leave the State, whereas it is only a misdemeanor if he remains within the State. Similarly, it is a felony to interfere with the custody of a child and to take the child out of the State, but interference with the custody of a child within the State is only a misdemeanor. Ga. Code § 26-1312. Thus, it can be seen that Georgia is consistent in its design to protect and insure adequate support for the most helpless members of its society.

## CONCLUSION

For the reasons stated in the Brief of Appellant and herein, we urge the Court to reverse the judgment of the Court of Appeals.

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## CERTIFICATE OF SERVICE

I, CAROL ATHA COSGROVE, one of the attorneys for the Appellant herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have this day served opposing counsel in this action with three copies of the foregoing Appellant's Reply Brief, by depositing three copies of the same in the United States Mail, with first class postage prepaid, addressed as follows:

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This ____ day of April, 1981.